

INTERNATIONAL CONTRACTS

AND

THE CHOICE OF LAW

A thesis

submitted in fulfilment

of the requirements for the Degree

of

Doctor of Philosophy

in the

University of Canterbury

by

S. M. Richardson

University of Canterbury

1988

KC
2097
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LIST OF ABBREVIATIONS

A.C.	Law Reports, Appeal Cases (England)
Adelaide L.R.	Adelaide Law Review
Albany L.R.	Albany Law Review
A.L.J.	Australian Law Journal
All E.R.	All England Law Reports
Am. J. Comp. Law	American Journal of Comparative Law
B. & B.	Broderip & Bingham. English Common Plea Reports
Beav.	Beavans Rolls Court Reports
Bing. N.C.	Bingham, New Cases, Common Pleas (England)
Build. L.R.	Building Law Review
Burr	Burrow's King's Bench Reports tempore Lord Mansfield
B.Y.B.I.L.	British Year Book of International Law
Cal. L.R.	California Law Review
Can. Bar Rev.	Canadian Bar Review
Case Western Reserve L.R.	Case Western Reserve Law Review
C.B.	Common Pleas Reports by Manning, Granger & Scott
C.L.R.	Commonwealth Law Reports (Australia)
Col. L.R.	Columbia Law Review
Colum J. of Trans- national L.	Columbia Journal of Transnational Law
Cornell L.R.	Cornell Law Review
Current Legal Probs.	Current Legal Problems
D. & C.L.D.	Durban & Coast Local Division Reports
De G. & Sm.	De Gex & Smith Chancery Reports
D.C.N.Y.	District Court New York
D.L.R.	Dominion Law Reports (Canada)
D.L.R. 2d.	" " " Second Series Canada
Duke L.J.	Duke Law Journal
Duquesne L. Rev.	Duquesne Law Review
E.D.N.Y.	Eastern District New York
E.E.C.	European Economic Community
Eng. Rep.	English Reports
Exch.	Exchequer
F.	Federal Reporter (U.S.A.)
F. 2d	" " Second Series (U.S.A.)
F. Supp.	Federal Supplement (U.S.A.)
Geo. L.J.	The Georgetown Law Journal
Hastings L.R.	Hastings Law Review
Harv. L.R.	Harvard Law Review
Harv. Int. L.J.	Harvard International Law Journal
H.C.	Hurlstone & Coltman
H.L.	House of Lords

Hofstra L.R.	Hofstra Law Review
Houston L.R.	Houston Law Review
Hy. Bl.	Henry Blackstone's Common Pleas Reports.
I.C.L.Q.	International & Comparative Law Quarterly
I.L.R.	International Law Reports
Int'l Fin. L.R.	International Financial Law Review
Int'l Lawyer	International Lawyer
Iowa L.R.	Iowa Law Review
J. Bus. Law	Journal of Business Law
J. Comp. Leg.	Journal of Comparative Legislation.
K.B.	Law Reports, King's Bench (England)
Kentucky L.J.	Kentucky Law Journal
Law & Contemp. Probs.	Law & Contemporary Problems
L. Ed.	Lawyers Edition, Supreme Court Reports (U.S.A.)
Lloyds Law Rep.	Lloyds Law Reports
Lloyds Maritime & Commercial L.Q.	Lloyds Maritime & Commercial Law Quarterly
L.Q.R.	Law Quarterly Review
L.T.	Law Times Reports
Marquette L.R.	Marquette Law Review
Mercer L.R.	Mercer Law Review
Minn. L.R.	Minnesota Law Review
Missouri L.R.	Missouri Law Review
Miss. L.J.	Mississippi Law Journal
M.L.R.	Modern Law Review
Moo P. & C. (N.S.)	Moore's Privy Council Cases
N.E.	Northeastern Reporter (U.S.A.)
N.E. 2d.	" " " " Second Series (U.S.A.)
Neth. Int'l L.R.	Netherland International Law Review
New L.J.	New Law Journal
N.Y. Civ. Ct.	New York Civil Court
N.Y. Law School J.	New York Law School Journal
N.Y. Laws	New York Laws
N.Y. Law Forum	New York Law Forum
N.Y.S.	New York Supplement (U.S.A.)
N.Y.S. 2d.	" " " " Second Series (U.S.A.)
N.Y.U. L. Rev.	New York University Law Review
N.Z.L.J.	New Zealand Law Journal
N.Z.L.R.	New Zealand Law Reports.
Okla L.R.	Oklahoma Law Review
Oxford J. Legal Studs.	Oxford Journal of Legal Studies
P.	Law Reports, Probate Division (England)
Pa	Pennsylvania
Pet.	Peters Supreme Court Reports (U.S.A.)

Prac. Law.	Practical Lawyer
Proceedings Am. Soc'y	Proceedings. American Society of International Law
Q.B.	Law Reports, Queen's Bench (England)
Qd.R.	Queensland Reports (Australia)
Rutgers L.R.	Rutgers Law Review
St. Louis U.L.J.	St. Louis University Law Journal
St. R. Qd.	State Reports Queensland (Australia)
S. Af. L.J.	South African Law Journal
Scand. Studies in Law	Scandinavian Studies in Law
S.D.N.Y.	Southern District. New York
S.L.T.	Scottish Law Times
So Calif. L.R.	Southern Californian Law Review
Stan(ford) L.R.	Stanford Law Review
S. Texas L.J.	South Texas Law Journal
Sup. Ct.	Supreme Court
Supp.	Supplement
Syracuse L.R.	Syracuse Law Review
Temple L.Q.	Temple Law Quarterly
Texas L.R.	Texas Law Review
Texas Internat. L. Rev.	Texas International Law Review
The American Univ. L.R.	The American University Law Review
The Internat. Lawyer	The International Lawyer
The Times	The Times Newspaper of London
T.R.	Durnford & East's Term Reports
Tulane L.R.	Tulane Law Review
U.C.C.	Uniform Commercial Code
U.C.L.A. L.Rev.	UCLA Law Review
U. Chi. L.R.	University of Chicago Law Review
U. Miami L.R.	University of Miami Law Review
U. Pa. L. Rev.	University of Pennsylvania Law Review
Univ. of Illinois L.R.	University of Illinois Law Review
University of Kansas L.R.	University of Kansas Law Review
U.S.(A.)	United States (of America)
Utah L.R.	Utah Law Review
U. Mich. L. School Summer Inst. on Int'l & Comp. Law	University of Michigan Law School Summer Institute on International & Com- parative Law
Vand L.R.	Vanderbilt Law Review
Virginia J. of Int'l Law	Virginia Journal of International Law
V.L.R.	Victoria Law Reports

Washington & Lee L.R.	Washington & Lee Law Review
Wash. Univ. L. Rev.	Washington University Law Review
Wayne L.R.	Wayne Law Review
W.Bl.	Sir William Blackstone's King's Bench Reports
Wm. & Mary L.R.	William & Mary Law Review
Wisc. L.R.	Wisconsin Law Review
W.L.R.	Weekly Law Reports (England)
Yale L.J.	Yale Law Journal

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ABSTRACT

The choice of law dilemma for international contracts is the subject of this thesis. In Part A the concept of party autonomy is discussed and the traditional English approach considered. This involves a critical examination of the proper law doctrine.

Part B considers the 'American Solution' with particular reference to the State of New York. Interest Analysis, New York legislation and common law are discussed. A criticism of the New York approach concludes this section.

In Part C the limitations on party autonomy are considered in both the English and New York setting.

In Part D four alternative proposals are canvassed. The *lex loci contractus* and the *lex loci solutionis* (the law of the place of contracting and the law of the place of performance) are briefly considered in an historical setting. These two theories contrast with the *lex validatis* (the law which validates) which is an academic suggestion. Finally the European Convention on the Law Applicable to Contractual Obligations (1980) is chosen as a legislative proposal to resolve the choice of law dilemma for international contracts. Its provisions are stated and discussed.

Parts A to D demonstrate that the law to govern international contracts on both sides of the Atlantic is unsatisfactory. To date New Zealand has followed the English proper law doctrine. However it is submitted that the time for change has arrived. It is argued that New Zealand needs a law which advances conflict of laws goals, avoids present difficulties and which is in harmony with domestic contract

law. Thus Part E considers such goals and the domestic and conflict of laws provisions of recent national contractual legislation. A legislative solution is then proposed and it is argued that if the proposals were adopted New Zealand would have gone a long way towards resolving choice of law issues for international contracts.

INTRODUCTION

"It would be in the interests of those involved in commercial transactions to have clear rules regarding the scope of party autonomy and the exceptions to party autonomy. The current state of the law in many jurisdictions does not enhance such predictability." ¹

The parties to a commercial contract generally expect their rights and obligations to be as well defined and predictable as possible, and this will be especially important when the contract has an interstate or international element. If a dispute arises it will be of paramount importance that their agreement be interpreted in a predictable manner.

The subject of this thesis is the choice of law dilemma for international contracts. The subject is chosen because it is of both academic and practical interest. Little has been written on the topic in this country but with expanding overseas trade New Zealand will become increasingly involved in contracts containing an international element. Therefore a satisfactory body of law is required to govern such contracts.

Emphasis is on international rather than interstate contracts and in general commercial contracts are considered. However non-commercial contracts are cited when there appears to be no relevant commercial contract on the point or if such a contract better illustrates the matter under discussion.

¹K. Mettälä. Governing Law Clauses of Loan Agreements in International Project Financing. (Winter 1986) Int'l Lawyer 219 at p.231.

The concern is with choice of law, however many other matters are closely related to choice of law issues. As the subject chosen is potentially so vast these other related considerations are not discussed but merely noted in passing.

It is argued that the present New Zealand conflict of laws for choice of law and international contracts is unsatisfactory. This country follows English law and has always done so. Having stated the defects in the English system the problem became one of limiting the scope of the thesis into manageable proportions. The subject of conflict of laws lends itself to comparisons. Given that the English law is unsatisfactory it became obvious to consider how other jurisdictions resolved choice of law issues in this field. It would for example have been interesting to consider the present conflict of laws pertaining in the South Pacific. However Australian conflict of laws although different in so far as federal choice of law issues arise is basically still the same as English law. For this reason the relevant conflict of laws provisions for the Australian states are not specifically considered.² Other non English speaking jurisdictions such as Japan were likewise rejected, mostly due to difficulties in obtaining recent materials in English. The decision to consider the "American Solution" to choice of law issues for inter-

²However where Australian decisions provide unique illustrations of matters under discussion they are included. See infra at p.37 et seq. for example.

national contracts was made on the grounds that this subject has always been vitally important in a federation containing so many states with different legal systems and for a country engaging the rest of the world in international finance and business. 'American' conflict of laws has thus the possibility of having much to offer. Due to the vastness of the United States material it was considered appropriate to limit the discussion here in some way. New York was chosen as being the American equivalent of London - both being commercial and financial centres where the respective courts are faced with international contracts having no obvious connection with the forum.

Europe is likewise an area of the world where international contracts occur daily in their multitudes. Thus the proposed European Economic Community law is considered in some detail.

Space did not permit discussion of the conflict of laws provisions for any other jurisdictions.

Terminology

An international contract is one that has "significant elements connected with more than one country".³ An interstate contract may be likewise defined as a contract having significant elements connected with more than one state⁴.

The terms choice of law clauses and governing law

³ A.J.E. Jaffey, Essential Validity of Contracts in the English Conflict of Laws. (1974) 23 I.C.L.Q. 1 at p.2. See also G.R. Delaume. What is an International Contract? An American and a Gallic Dilemma (1979) 28 I.C.L.Q. 258.

⁴ Unless specifically stated otherwise references to international contracts include interstate contracts as well.

clauses are synonymous.⁵ Generally speaking the English and Commonwealth decisions and articles use the former term whilst the Americans use the latter phrase.

Likewise the terms 'applicable law'; 'governing law', and 'proper law' all mean the same. The phrases refer to the *lex causae*, the law which is applicable or proper. It is the law that governs the contract. As with choice of law clauses and governing law clauses different jurisdictions tend to favour different terminology. The Americans use the term 'governing law', the English the 'proper law' and Europeans often refer to the 'applicable law'.⁶ The terms are used interchangeably in the text and whilst it is an argument of this thesis that there is no inherently proper law of an international contract the term is nevertheless used when discussing English case law.

Options open to Parties

The parties to an international contract have various options open to them. These may be briefly outlined by way of introduction to the subject. The parties can :

- (1) Avoid the conflict
- (2) Include a forum selection clause
- (3) Incorporate terms into their contract
- (4) Include a choice of law clause
- (5) Ignore the problem

⁵One writer has gone as far as effecting an amalgamation of both terms and refers to choice-of-governing-law clauses. See R.C. McCartney. *The Use of Choice of Law Clauses in International Commercial Contracts*. 6 Wayne L.R. 340 at p.359 (1960).

⁶As for example in the European Economic Convention on the Law Applicable to Contractual Obligations (1980) discussed *infra* at p.410.

Conflict Avoidance

First and obviously the parties can try to avoid any conflict arising by complying with all local laws. They could also move the entire transaction into one jurisdiction thus ensuring that the domestic law of that forum apply.⁷

Forum Selection Clauses

Secondly the parties can include in their contract a choice of forum clause. Such a clause specifies that any controversies arising from the transaction are to be determined or resolved in one particular tribunal or court. Traditionally choice of forum clauses have been seen as a satisfactory means of determining the governing law because a choice of forum clause was presumed to amount to a choice of law clause. Thus, for example if one chose arbitration in London, English law was taken to be the law the parties wanted to govern their contract.⁸ A forum selection clause can exist side by side with a choice of law clause.⁹ Whilst such clauses are obviously of great importance they are

⁷C.E. Maw. Conflicts Avoidance in International Contracts: Choice of Law and Language. Parker School of Foreign and Comparative Law (1961) at p.24. See also C.E. Maw. Applicable Law & Conflict Avoidance in International Contracts. 25 The Record of the Association of the Bar of the City of New York p.365 (1970).

⁸This is no longer so. See *infra* at p.49 et seq.

⁹A similar type of clause is a 'derogation' clause. See R.J. Weintraub. Functional Developments in Choice of Law for Contracts. (1984) (iv) Recueil des Cours 243 at p.290 et seq.

beyond the scope of this thesis.¹⁰

Incorporation

Thirdly, if the parties do not wish to exercise their option of inserting a choice of law clause into their contract they can nevertheless incorporate certain domestic provisions of a foreign law.¹¹ It is open to the parties to an English contract (subject to any statutory prohibition to the contrary) to agree that their rights and liabilities shall be determined in accordance with the relevant articles of, say, the French Civil Code. The effect is to incorporate the French articles as contractual terms. It has been described as a "convenient shorthand alternative" to setting out the French articles verbatim.¹² Whether a particular term incorporated in this manner is valid is determined by the governing law. It is well established that this right

¹⁰The English and New York law is well summarised by Mettala op. cit. supra n.1. at p.236 et seq. For a more detailed general discussion of English law see R. Graupner. Contractual Stipulations Conferring Exclusive Jurisdiction Upon Foreign Courts in the Law of England and Scotland. (1943) L.Q.R. 22 et seq. For New York see M. Gruson. Forum Selection clauses in International and Interstate Commercial Agreements. Univ. of Illinois L.R. 133 (1982). For New Zealand see A.A. Tarr. Jurisdiction Clauses [1980] N.Z.L.J. 461. See also D.J. Branson & R.E. Wallace. Choosing the Substantive Law to apply in International Commercial Arbitration. 27 1. Virg. J. of Int'l L. 39 (1986).

¹¹See generally Cheshire and North's Private International Law. (1979) (10th edit.) at pp.202-3. (Hereinafter cited as Cheshire & North.) J.H.C. Morris. The Conflict of Laws (1984) (3rd Edit.) at p.274. (Hereinafter cited as Morris.) Dicey & Morris. The Conflict of Laws (1980) (10th edit.) at p.758. (Hereinafter cited as Dicey & Morris.)

¹²Morris ibid.

of incorporation may be freely exercised¹³ and once incorporated they become English terms and are construed as such. The main advantage of incorporation is that the terms incorporated do not change. The French code might be amended but the terms once included in the contract remain constant. On the other hand if the parties choose French law as the proper or governing law then it is well settled that the proper law is a living law and must apply as it is when the contract is to be performed and not as it is when the contract is made.¹⁴

Fourthly parties can include a choice of law clause in their international contract. Such a clause specifies which law is to govern the contract should the need arise.

If the parties do not exercise any of the foregoing choices then the forum will apply its conflict of laws rules to determine which law shall apply. It is these two last situations that are the concern of this thesis.

Types of Governing Law Clauses

No special language is required. It is sufficient to state, for example, that "any dispute relating to this contract shall be decided according to [English] law".¹⁵

¹³Cheshire & North at pp.202-3.

¹⁴See Morris at p.274.

¹⁵In Euroloan Agreements for example a typical choice of law clause would read: Proper Law: this Agreement shall be governed by and construed and interpreted in accordance with the laws of [England].

See A.C. Cates & S. Isern-Feliu. Governing Law Jurisdiction Clauses in Euroloan Agreements. (1983) Int'l Fin.L.R. 28. For other examples see R. Brown. Choice of Law Provisions in Concession and Related Contracts. (1976) 39 M.L.R. 625 at p.627 et seq.

A.J.E.Jaffey. Limitations on Choice of Law Provisions. A

In standard form contracts it is quite common to see a choice of law clause in the printed text. The printed clause usually has an open space where the parties are supposed to fill in the name of the state or country whose law shall be decisive. Some standard form contracts go one step further. For example the Baltic & International Maritime Conference (Copenhagen) Barecon Charter Clause 25 states "This charter shall be governed by the law of the country agreed to in Box 33 (if Box 33 is not filled in then English law applies.)"¹⁶

A choice of law clause can also refer indirectly to the governing law by declaring which connecting factor is to be relevant. For example the contract may state that a charter party is to be subject to the law of the flag¹⁷. As noted above some contracts contain jurisdiction or arbitration clauses only. At different periods of time these have been seen as synonymous with a choice of law clause.¹⁸

The object of a choice of law clause is to state which law out of competing laws is to govern the contract. Potentially the parties could choose one of a number of laws.

Comment. (1977) 40 M.L.R. 440 and R. Brown. Choice of Law Provisions - A Rejoinder. (1977) 40 M.L.R. 442.

¹⁶See S. Braekhus. Choice of Law Problems in International Shipping (1979) 111 Recueil des Cours 255 at p.264.

¹⁷E.g. Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime S.A. [1971] A.C. 572.

¹⁸Discussed infra at p.49 et seq.

A party might wish for his own law to apply, alternatively he might accept the foreign law or choose a combination of both laws to govern the contract. Yet again a state unconnected with either party could be chosen. The governing law clause could apply to all legal aspects of the transaction or alternatively it could govern only certain aspects.

Options open to the Courts

Not only do the parties have a choice but the court faced with an international contract containing a choice of law clause likewise has a number of options open to it.

The court may give effect to the parties' choice of law clause. Here the court is said to recognise party autonomy. On the other hand the court could completely ignore the parties' wishes; thirdly the court could treat a choice of law clause as a relevant but not the most important factor in deciding what is the applicable, governing and proper law - the *lex causae* of the contract. In this last situation a choice of law clause is said to be a 'connecting factor'. Thus a choice of English law would help connect English law to the contract; other connecting factors might be the place where the contract is made (the *locus contractus*) or performed (the *locus solutionis*.)

The Problem

The choice of law dilemma for international contracts is concerned with two major problems. The first concerns party autonomy. It is generally accepted that the world's major legal systems allow for a certain amount of party autonomy. This autonomy principle or rule is not however as broad as its name might suggest. One of the enduring

problems associated with the autonomy theory is the extent to which party freedom is restricted.

The second major problem concerns the difficulties for a forum faced with an international contract with elements in a number of jurisdictions and which contains no choice of law clause. How is the Court to decide which law is to govern the contract?

These two matters should be kept distinct. An international contract with a choice of law clause should be viewed as something radically different from an international contract that contains no such clause. However the cases in the jurisdictions considered and the academic writers do not always do this. The three rules of the Proper Law concept for example are generally discussed together as are the various governmental interest analysis theories in America.

Ideally the theories and rules canvassed in this thesis should be considered twice, first as they relate to choice of law clauses and secondly as they pertain to international contracts that are silent on choice of law issues. However as "one can't have everything",¹⁹ instead of dividing this thesis into two parts, the first dealing with party autonomy and the second with the lack thereof, the traditional approach has been adopted whereby the rules or approaches for both situations are considered together. The very concepts currently used, such as the proper law doctrine require such treatment because of the interrelationship of the doctrine's

¹⁹As Morris said when discussing the new arrangement of materials in the third edition of his text book 'The Conflict of Laws'. See the Preface at p.vii.

rules. This is itself a criticism of the doctrine. However before criticising the law, it is necessary to state the present New Zealand position regarding international contracts and the choice of law. New Zealand law follows English law in this field. Thus the English Conflicts of Law approach is first considered. Before discussing the 'Proper Law of the Contract', the concept of party autonomy in a general historical setting is considered appropriate as this sets the stage and assists in the understanding of the proper law doctrine itself.

PART A

Chapter I Party Autonomy

Chapter II The Proper Law of a Contract

Chapter III Criticisms of the Proper Law
Doctrines

Chapter I.

PARTY AUTONOMY

Introduction

The first matter to consider is that of party autonomy. The theory is defined and its origins traced from civil law jurisdiction.

The development of party autonomy in America is next considered, again, briefly. The English Proper law doctrine is then discussed which leads beyond the concept of party autonomy, as the Proper law doctrine applies to contracts where the parties have not made a choice of law decision. In other words the Proper law doctrine determines which law will apply in all contractual situations.

Party Autonomy Defined

Party autonomy simply means that the parties to a transaction are free to choose the law to govern their contract. They have autonomy of will. Complete party autonomy allows the parties to choose any law they like without any restrictions whatsoever. As will become apparent jurisdictions have generally felt the need to limit party autonomy in one way or another. At various points of time in differing jurisdictions the choice has had to be reasonable or substantially connected.¹ Some systems of law have required that the choice be bona fide and legal.² These limitations are discussed in detail below. Party

¹See infra at p.220 et seq. & p.271 et seq & pp.347-8.

²See infra at p.35 et seq. & p.342 et seq.

autonomy may also be called the Intention Theory.³ In both the parties' wishes or intentions are respected and given effect to. The Implied Intention Theory differs radically as is shown in the following section. In this latter situation the court and not the parties decide which law is to apply to the transaction in question. Occasionally it may be the parties' intention that the court is giving effect to; but it may equally be quite the reverse. Finally the concept of party autonomy differs from the proper law doctrine in so far as the proper law doctrine is designed to cover three situations.

The Proper Law doctrine applies when parties have made a choice (party autonomy), have failed to consider the matter and the middle position which concerns those situations where the parties have not articulated their intentions sufficiently, but have nevertheless made a choice of law decision.

Finally a note on the theory of party autonomy would appear relevant at this point. Yntema⁴ considered that in general three possible meanings have been proposed over the years.

Under the first view the parties to a legal transaction have the power, subject to the general public laws, to choose the law governing the transaction. Accordingly their intention is controlling as regards the applicable law. In this view private consent provides the law of the contract,

³The parties' intentions and wishes are respected and upheld.

⁴H.E. Yntema. Autonomy in choice of law. 1 Am J. of Comp. Law 341 at p.343 et seq. (1952).

except as restricted by imperative statutory requirements.

Pursuant to the second view the sovereign state plays a much more dominant role. The parties are free, within the limits prescribed by law, to enter into agreements on such terms as they may prefer.

For their convenience, they may adopt the rules of a given legal system. But such 'incorporation' of legal provisions is not legislation; these provisions are binding only because, and to the extent that, the law prescribed by the sovereign state having jurisdiction over the contract so provides.

A third view suggests that autonomy denotes not a power to stipulate the applicable law as such but the freedom of the parties in contracting to localise transactions by their voluntary acts. The law of the contract is determined by its economy, the circumstances that indicate its location in space, which may, but usually do not, include an express stipulation regarding the applicable law.

These three views have enjoyed differing support over the centuries by both courts and academic writers; much depending on the basic theories of conflict law in general prevailing at the given time. The only firm conclusion that may be stated is, that whatever theory is, or has been in vogue, party autonomy has existed for a very long time (by Conflict of Laws standards), and in the words of Rabel⁵

⁵ E. Rabel. *The Conflict of Laws: A Comparative Study* (1958-1964) (2nd edit.) at pp.368-9. For a general world-wide survey see Rabel at p.368 et seq and Yntema op.cit. supra n.4 at p.350 et seq.

"Despite some resistance by writers, there is practically no doubt that the parties to a contract have a right to determine by agreement the law applicable to their contractual relationship. Only the limits may be controversial."

The Development of Party Autonomy in Civil Law Jurisdictions

It has been suggested that the doctrine can be traced back into Roman times.⁶ It may be noted⁷ that the Roman Empire regarded a system of law as the peculiar property of the person entitled to it and which an individual might claim as of right at any time. However one could always decide to accept another system of law. In other words whilst a Roman citizen anywhere in the world had a right to claim the protection of Roman law he could also waive that protection and abide by the law of the place where he happened to be. This liberty of choice has persisted into modern times, for "it is a prevailing doctrine on the Continent of Europe that in the case of all voluntary obligations, parties, since they have the right to choose whether or not they will be bound, have also the right to choose the law under which they shall be bound. This doctrine, first clearly formulated by Dumoulin,⁸ is known as the principle of auto-

⁶See generally O. Lando. 'Contracts' in International Encyclopaedia of Comparative Law.(1976). Vol.III at p.5 et seq.

⁷J. Beale. What Law Governs the validity of a contract? 23 Harv. L.R.1 at p.7. (1909-1910).

⁸Charles Dumoulin (1500-66) the father of party autonomy appears to have been the first scholar to have criticised the place of contracting rule. For a brief summary of his views see O. Lando. The Proper Law of a Contract.(1964) 8 Scand. Studies in Law 107 at p.114 et seq. See also A. Nussbaum. Conflict Theories of Contract. Cases versus the Restatement. 51 Yale L.J. 893 at p.895 (1942) who considers

onomy of will.⁹

The influence of Dumoulin and such writers as Huber, Voet, Savigny and Laurant is still felt in Civil Law countries today.¹⁰ Huber¹¹ stated for example that contracts are entirely governed as regards form and substance by the *lex loci contractus*¹² and he then in effect retracts his statement by warning the reader that "if the parties in contracting have another place in mind the *lex loci contractus* should not prevail."¹³

Whilst party autonomy became prevalent in civil law jurisdictions its acceptance in common law countries was a slower business. Its appearance into American conflict of laws is now briefly considered.

that Molineaus, the sixteenth century French jurist is the founding father of the theory of party autonomy.

⁹Beale. *op.cit.* supra n.7 at p.7.

¹⁰M. Wolff. *The Choice of Law by the Parties in International Contracts*, (1937) 49 *Juridical Rev.* 110. In France for example the parties are considered to be free by virtue of Article 1134 of the Civil Code. Art.1134. Agreements legally made take the place of law for those who make them. They may be revoked only by mutual consent or for causes which the law authorises. They must be exercised in good faith. (The French Civil Code as amended to July 1 1976, J. H. Crabb 1977).

¹¹Huber. *De Conflictu Legum Diversarum in Diversis Imperiis* (1689).

¹²*Ibid.* No. 5 translated by E.G. Lorenzen. *Selected Articles on the Conflict of Laws* (1974) at p.167.

¹³*Ibid.* No. 10 translated by Lorenzen *ibid* at p.174. See Morris at p.267, and D.J.Llewelyn Davies. *The Influence of Huber's De Conflictu Legum on English Private International Law.* (1937) 37 *B.Y.B.I.L.* 49.

Development of Party Autonomy in the United States

In the early years of the nineteenth century the idea grew up that a contract could be governed "by the law with a view to which it is made."¹⁴ If the parties entered into their contract in a particular state or country it could be assumed that they intended that that law should govern their transaction. This could be rebutted if they entered a contract in one place and specified performance in another place; in this situation it could be inferred that the parties intended the *lex loci solutionis*¹⁵ to govern. In other words although in both cases the *lex loci contractus* or the *lex loci solutionis* was being applied it was not so much the place of contracting or performance that counted but the parties' intention.

From the parties' point of view this development had the result of allowing them to choose a law to govern their contract insofar as they could choose the place of contracting or the place of performance. It was still a long way off party autonomy in its fullest sense of allowing the parties to choose any law they liked.

From the court's point of view this development allowed the judge to presume an intention. If the parties chose

¹⁴Wayman v. Southard. 10 Wheat 1 at p.48 (U.S.) 6 L.Ed. 253 at p.264 (1825).

¹⁵The *lex loci solutionis* is the law of the place of performance and the *lex loci contractus* is the law of the place of contracting.

performance in a given state then it could be held that that was the law the parties intended to apply. It was a fiction. Quite often the parties may not have given the choice of law question a thought. However from a judge's viewpoint it saved much difficulty in trying to find out what the parties had really intended, a problem facing judges in contract cases generally.

The case concerning the birth of the intention theory in the United States is generally considered to be the 1882 case of Pritchard v. Norton¹⁶ which involved a contract between a New York resident and a Louisiana resident whereby the New York resident was to indemnify the Louisiana resident from loss on an appeal bond which the Louisiana resident had executed in connection with litigation in a Louisiana court. The contract was executed and delivered in New York, but was unenforceable there because of lack of consideration. This contract was, however, valid when tested by provisions of Louisiana law. The lower court applied New York law, thereby invalidating the contract. The Supreme Court reversed this decision, saying:

"But, in the case of contract, the foreign law may, by the act and will of the parties, have become part of the agreement; and in enforcing this, the law of the forum may find it necessary to give effect to a foreign law,"¹⁷

¹⁶106 U.S. 124 (1882).

¹⁷Ibid at p.129.

Similarly during the same century American writers were considering exceptions to a straight out application of either the *lex loci contractus* or *lex loci solutionis*,¹⁸ and it has been suggested that the writings of continental scholars such as Huber and Voet influenced judges and academics on both sides of the Atlantic.¹⁹

Although early examples may be cited of this presumed intention theory²⁰ and whilst examples can be found throughout its history²¹ it has been suggested that its widespread acceptance never eventuated due to the fact that it was a fiction.²² Secondly the limited acceptance of an intention theory can be attributed to the critics of the doctrine. Outstanding among these was Beale, who as an advocate of the territorial vested rights theory was one of the most severe and influential critics of the intention rule. Unlike most other critics however, Beale had the opportunity to translate his objections into action which retarded development of uniformity in the concept throughout the United States.

¹⁸Story writing in 1834 suggested that the *lex loci solutionis* should be applied wherever the parties contracted, expressly or tacitly for performance in a place that differed from the place of contracting. He applied the *lex loci solutionis* on the objective ground that this was the presumed intention of the parties. See J. Story. Commentaries on the Conflict of Laws (1834) at pp.459-460.

¹⁹See H.E. Yntema. Contract and Conflict of Laws: Autonomy in choice of Law in the United States. 1 N.Y. Law Forum 46 at p.49 et seq. (1955).

²⁰E.g. Andrews v. Pond 38 (13 Pet) 65 (1839) and for other examples see T.W. Pounds. Party Autonomy - Past and Present. South Texas L.J. 217 footnote 19. (Fall 1982).

²¹Ibid.

²²See M.J. Levin. Party Autonomy, Choice of Law Clauses

In 1927 The American Law Institute held a conference during which Chapter 8 (Contracts) of the proposed Restatement of Conflict of Laws was considered for the last time. At this conference, Beale, as Reporter for the Restatement, was directed to prepare a revision of this chapter on contracts. He did so and it was totally devoid of any mention of the party intention concept. Similarly, the finished restatement was subsequently published in 1934 with a complete absence of any mention of party intention.²³

Development of the theory following the Restatement was erratic²⁴ but remained a viable doctrine rather than fulfilling Beale's hopes, and gradually the idea was developed that rather than impute an intention the actual intention of the parties could be applied.

By 1942 Nussbaum was able to conclude after a detailed examination of the cases that

in Commercial Contracts. Georgetown L.J. 260 at p.269 (1957-58).

²³By ignoring this significant portion of conflicts law, the Restatement departed from its purpose of consolidating and restating case law, and made what could be considered as an affirmative pronouncement that party intention formed no real part of American case law. That such a distortion of the then existing law was intentional was indicated by Beale in 1935 when he stated "[i]t is probable that before many years have passed the influence of the American Law Institute will have led to the abandonment of the doctrine of intention of the parties, and to the general adoption of the law of the place of contracting." See 2 Beale. Conflict of Laws (1935) at p.1174.

²⁴Pounds op. cit. supra n.20 at p.220 et seq. and infra at p.217.

"the law of the country, with which in the expressed or presumed intent of the parties the contract had its most important connection, shall govern, taking into account the various territorial 'contacts' of the contract, such as the place of contracting, place of performance, domicil of the parties, situs of the res. etc."²⁵

The first major step toward bringing about a general acceptance of the concept of party autonomy was the formulation of the 1952 version of the Uniform Commercial Code, drafted with the aid and concurrence of the American Law Institute.²⁶

Also in the 1950's the case of Auten v. Auten²⁷ did much to promote party autonomy. Both Code and case reject the imputing of intentions to parties. In the Auten decision Judge Fuld writing for the New York Court of Appeals clearly repudiated the imputation of fictional intentions to contracting parties and adopted the "centre of gravity" or "grouping of contracts" approach in order to apply the policy and laws of the jurisdiction "most intimately concerned with the outcome of [the] particular litigation",²⁸ and also to give effect to the probable

²⁵A.Nussbaum. Op.cit. supra n.8 at p.896.

²⁶Discussed infra at p. 217 et seq.

²⁷124 N.E. 2d 99 (1954).

²⁸Ibid at p.102, quoting Note, Choice of Law Problems in Direct Actions Against Indemnification Insurers. 3 Utah L. Rev. 490, at pp.498-9 (1953).

intention of the parties and consideration to whether one rule or the other produces the best practical results."²⁹

The Uniform Commercial Code of New York permits party autonomy subject to certain qualifications which are discussed below.³⁰

English cases on the other hand developed the concept of the "proper law" of a contract. How to find the proper law and in particular the degree to which each party should be permitted to choose or to be presumed to have chosen that law are matters that have exercised English courts and scholars to no little degree, and it is this English approach that is next considered.

²⁹124 N.E. 2d 99 at p.102.

³⁰Infra at p.220 et seq.

Chapter II

THE PROPER LAW OF THE CONTRACTThe Proper Law Defined

The term "proper law of a contract" means the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection.¹

"'The proper law of the contract' means that law which the English court is to apply in determining the obligations under the contract. English law in deciding these matters has refused to treat as conclusive, rigid or arbitrary criteria ... and has treated the matter as depending on the intention of the parties."²

"Parties are entitled to agree what is to be the proper law of their contract, and if they do not make any such agreement then the law will determine what is the proper law. There have been from time to time suggestions that parties ought not to be so entitled, but in my view there is no doubt that they are entitled to make such an agreement and I see no reason why, subject though it may be to some limitations, they should not be so entitled. But it must be a contractual agreement. It need not be in express words. Like any other agreement it may be inferred by reading the agreement as a whole in the light of relevant circumstances known to both parties when they made their contract."³

The definition given by Dicey & Morris above includes

¹Dicey & Morris. Rule 145 at p.747. See generally Dicey & Morris at p.747 et seq. Morris at p.267 et seq. Cheshire & North at p.195 et seq.

²Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society [1938] A.C. 224 at p.240 per Lord Wright.

³James Miller and Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd. [1970] A.C. 583 at p.603 per Lord Reid.

the three English rules on choice of law for contracts, because it is sufficiently widely drafted to incorporate:

1. The parties' actual express choice.
2. The parties' choice which although not express can be inferred.
3. The situation where the parties have not made a choice of law decision. Here the court applies the law most closely connected to the contract to govern.

Historical Development of the Proper Law Doctrine in England

Robinson v. Bland⁴ is generally considered to be the first major decision on party autonomy in England.⁵ It was the decision where Lord Mansfield made his famous statement that:

"The law of the place can never be the rule where the transaction is entered into with an express view of the law of another country, as the rule by which it is to be governed."⁶

On the facts of the case the two laws, that of France and England were identical. However the judges all expressed their views on the question of which law would prevail

⁴1760 1. W.Bl. 234 (1760). 2 Burr. 1077.

⁵Although other earlier examples can be cited, see for example Foubert v. Turst 1 Eng. Rep. 464 (1703) which involved a large settlement containing a clause that it should be governed by the customs of Paris. The Court held that "all lawful contracts as well as of marriage, as well as anything else, ought to be fully performed between the parties and their representatives, according to the apparent intent of such contracts." Ibid at p.465.

⁶1760 1 W.Bl. 234 at p.259.

if the laws of France and England were different. Dennison J. considered that English law would prevail, since the plaintiff had chosen England as his forum and must therefore be bound by English law. Wilmot J. held that a claim contrary to the public policy of the forum could not succeed in England. Lord Mansfield said,

"The general rule established ex comitate et jure gentium, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception when the parties at the time of making the contract had a view to a different Kingdom."⁷

He went on to give his famous dictum above.

These three judges may be seen as expressing four possible views as to the law which should govern if the laws of France and England had been different.

1. The law of the forum.
2. The law of the place of performance.
3. The law intended by the parties.
4. The law of the place of performance as that presumably intended by the parties.

Lord Mansfield's first reason for preferring the law of England, i.e. "that it was the law intended by the parties, has never been repudiated by an English court and has finally been accepted as the rule by which the validity of all contracts is to be decided."⁸

⁷Ibid at pp.258-9.

⁸J. Beale. What Law Governs the Validity of a Contract? 23 Harv. L.R. 1 at p.6 (1909-1910).

During the next century English Judges continued, however, to rely on the law of the place of contracting more frequently than on any other law. Various writers⁹ have suggested that it was not until 1865 that the law of the place of contracting was finally abandoned in favour of the proper law and that the case which shows the transition most clearly is P. & O. Steam Navigation Co. v. Shand.¹⁰

The facts of the case were that the plaintiff who had been appointed Chief Justice to Mauritius, bought a ticket in England for his passage from Southampton to Alexandria and from Suez to Mauritius on board the defendant's steamships. An exemption clause excluded the defendant's liability for loss of or damage to passenger's luggage. The plaintiff's luggage was lost in Egypt. The Supreme Court of Mauritius held that the contract was governed by French Law which was the law which prevailed in Mauritius and by that law the defendants were liable in spite of the exemption clause. This decision was reversed by the Privy Council. Having laid down the general rule that contracts were governed by the *lex loci contractus*, the Court went on to stress the fact that the greater part of the performance was to be on board two English ships and that the application of English law must have been intended by both parties. However, the point was made that the carrier would never

⁹Morris at p.267 and Lando. O.Lando. The Proper Law of a Contract.(1964) 8 Scand. Studies in Law 107 at p.126.

¹⁰(1865) 3 Moo P.C. (N.S.) 272.

have accepted the law of Mauritius and emphasis was put on the parties' intention. It was this reasoning that marks the case as one of significance.

Also in the same year Willes J. in Lloyd v. Guibert¹¹ said

"In such cases it is necessary to consider by what general law parties intended the transaction should be governed, or rather by what general law it is just to presume that they have submitted themselves to in the matter."¹²

By these two cases the principle of party autonomy seems to have been established in English law.

Two decades later Bowen L.J. in Jacobs v. Crédit Lyonnais¹³ held that

"What is to be the law by which the contract or any part of it, is to be governed or applied must always be a matter of construction of the contract itself as read by the light of the subject matter and of the surrounding circumstances."¹⁴

Party autonomy was supported by the laissez-faire philosophy of the nineteenth century and was in harmony with the English substantive law of contracts at that period which emphasised freedom of contract; thus by the twentieth century it had been established that

"It is now well settled that by English law the proper law of the contract is the law which the parties intended to apply."¹⁵

¹¹(1865) L.R. 1.Q.B. 115.

¹²Ibid at pp.120-1.

¹³(1884) 12 Q.B.D. 589.

¹⁴Ibid at p.600.

¹⁵Vita Food Products Inc. v. Unus Shipping Co. Ltd.
[1939] A.C.277 at pp.289-290 per Lord Wright.

THE PRESENT ENGLISH LAW: THE PROPER LAW OF A CONTRACT

Introduction

English courts apply the proper law of the contract when the contract contains facts or contacts with more than one jurisdiction. Whilst "it is now well settled that by English law the proper law of the contract is the law which the parties intended to apply"¹⁶ the difficulty lies in ascertaining this party intention.

Parties to a contract may of course expressly state that they wish the law of England, or wherever, to govern their contract, and then the court will, subject to certain qualifications discussed below¹⁷ honour such choice. These are the easier cases. With increased sophistication in international business matters parties will presumably and hopefully employ express choice of law clauses with increasing frequency. Unlike the New York situation there appear to be no recent surveys considering the incidence of governing law clauses in England.¹⁸ There will however always be a range of possible situations. Parties will use governing law clauses, will ignore the matter or they will be seen as taking a middle course whereby they intend a law to govern but fail to expressly state which law that is.

¹⁶Vita Food Products Inc. v. Unus Shipping Co. Ltd.
[1939] A.C. 277 at pp.289-90 per Lord Wright.

¹⁷Infra at p.35 et seq. & p.342 et seq.

¹⁸A New York survey is discussed infra at p.310 et seq.

In England three rules have been developed to assist the court in its enquiry. Thus the traditional English approach is for the judge to enquire first, whether there is an express selection of the proper law by the parties, secondly, if not, whether there is an implied selection, and thirdly, if not, with which system of law did the transaction have its closest and most real connection. These three stages will be considered in turn.

RULE I: Express Choice: Party Autonomy

Definition

"It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract, if any, which will be conclusive..."¹⁹

Numerous other cases have given a similar definition.²⁰

Dicey & Morris state the rule in the following words:

"When the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention in general determines the proper law of the contract."²¹

It has been recognised since Robinson v. Bland²² that at the time of making the contract the parties may expressly select the law by which it is to be governed.²³ All they need to do is declare their common intention by a simple statement that the contract shall be governed by the law of a particular country. For example in an early twentieth

¹⁹R. v. International Trustee for the Protection of Bondholders Akt [1937] A.C. 500 at p.529 per Lord Atkin.

²⁰E.g. "Parties are entitled to agree what is to be the proper law of their contract ... There have been from time to time suggestions that parties ought not to be so entitled but in my view there is no doubt that they are entitled to make such agreement, and I see no good reason why, subject it may be to some limitations, they should not be so entitled." James Miller & Partners Limited v. Whitworth Street Estates Ltd. [1970] A.C. 583 at p.603 per Lord Reid. (However this statement was obiter because there was no express choice of the proper law in that case.) See also Du Pont v. Agnew [1987] 2 Lloyds Law Rep. 585 at p.592.

²¹Dicey & Morris, Rule 145 SubRule 1, and see generally Dicey & Morris, p.747 et seq., Cheshire & North, p.199 et seq., Morris, p.270 et seq.

²²1760. 1.W.B. (1760) 2 Burr 1077.

²³See also Gienar v. Meyer (1796) 2 Hy. Bl. 603 and the list of cases cited by Cheshire & North at p.199, footnote 2.

century case it was specified that "the contract evidenced by this bill of lading shall be governed by the law of England."²⁴ The case which was a decision of the then New Zealand Supreme Court concerned a contract involving shipment of goods from England to New Zealand and the court held that whilst English law governed the contract as the *lex loci contractus* the matter was completely settled by the incorporation of this clause and thus New Zealand legislation did not apply to the contract.²⁵

The leading case on express choice is the Privy Council decision of Vita Food Products Inc. v. Unus Shipping Co. Ltd.²⁶

The facts were that a cargo of herrings was shipped from Newfoundland for New York on board a Nova Scotian vessel. Owing to negligent navigation the ship came to grief off the coast of Nova Scotia and the herrings were damaged.

The bill of lading stated that the contract was governed by English law and exempted the shipowners from liability for negligence. A Newfoundland Statute provided that every outward bill of lading from Newfoundland must contain the Hague Rules; because out of date forms were used the bill of lading in question did not contain these relevant provisions.

²⁴New Zealand Shipping Co. Ltd. v. Tyree (1912) 31 N.Z.L.R. 825.

²⁵Thus also illustrating the New Zealand development away from the mechanical rule of the *lex loci contractus*.

²⁶[1939] A.C. 277. Although not binding in England it is generally stated to be the leading case.

The buyers sued the shipowners. Both parties assumed that Newfoundland law was the proper law of the contract.²⁷

The Privy Council however held that English law was the proper law and consequently as the choice of it was valid there was no liability by reason of the contract.

The importance of the decision for the present purposes is that it is the most authoritative pronouncement on the limits of party autonomy.

Limits on Party Autonomy

Bona Fide, legal and not contrary to the public policy of the Forum

There are two schools of thought on the question of freedom of choice of law, a topic which has received much attention over the years.²⁸ One view of the matter is that the parties to a contract have complete freedom of choice provided that their choice is made in good faith and does not involve any inroad on the public policy rules of the *lex fori*. The other view²⁹ is that parties have a choice but that they cannot make a system of law with which the contract has no connection the proper law of the contract. The first of these solutions, i.e. a freedom of choice which is

²⁷See J.H.C. Morris & G.C. Cheshire. The Proper Law of a Contract. (1940) 56 L.Q.R. 320 at p.325. The article provides a detailed examination of the facts together with a criticism of the case.

²⁸Gutteridge considered this to be one of the fundamental problems of private international law. See H.C.Gutteridge. Notes. (1939) L.Q. Rev. 323 at p.324. and see generally P.R.H. Webb and D.J.L.Brown. A Casebook on the Conflict of Laws (1960) p.332 et seq. (Hereinafter cited as Webb & Brown).

²⁹See for example M. Wolff. The Choice of Law by the

virtually absolute, was adopted by the Privy Council in the Vita Food case. In the words of Lord Wright³⁰ "connection with English law is not as a matter of principle essential." Lord Wright also dealt with the question of the limits to be assigned to the doctrine by the statement that "it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal and there is no reason for avoiding the choice on the ground of public policy."³¹

This statement is not free from ambiguity as it is difficult to know by which law Lord Wright intended the legality to be tested. The only safe conclusion would appear to be that a choice is not bona fide or legal if it can only be explained as having been made to escape some otherwise applicable law.³² Dicey & Morris³³ suggest that a foreign law would thus not be applied if it contravened the public policy of the forum or the mandatory provisions

Parties in International Contracts. (1937) 49 Juridical Review 110 and G.C.Cheshire. International Contracts. Being the fifteenth Lecture on the David Murray Foundation in the University of Glasgow delivered on March 4 1948 at p.31 et seq. (Hereinafter cited as Cheshire).

³⁰[1939] A.C. 277 at p.290.

³¹Ibid.

³²This is discussed in greater detail below. See infra at p.342 et seq.

³³Dicey & Morris at p.756.

of a foreign proper law. A choice of law unconnected with the contract could be seen as an evasive attempt and therefore not bona fide.

As the case endorses the subjectivist school of thought on party autonomy it has, obviously, attracted much criticism by the opposing objectivist adherents who quickly pointed out the rather odd results of the case.³⁴

What is relevant here is the fact that although now by conflict of laws standards an old case Vita Foods remains the prevailing judicial authority on the limits of party autonomy. There are no English or New Zealand decisions which have altered Lord Wright's dictum.

There would appear to be only two Commonwealth decisions where the parties' choice was set aside as being either unconnected with the realities of the contract or an attempt to evade a statute in force in the forum and these are both Australian decisions. The first case was Golden Acre Ltd. v. Queensland Estates Ltd.³⁵

³⁴See F.A. Mann. The Proper Law of the Contract (1950) 3 The Int. L.Q. 60. J.H.C. Morris. The Proper Law of the Contract: A Reply (1950). 3 The Int. L.Q. 1970. F.A. Mann. The Proper Law of the Contract. A Rejoinder (1950) 3 The Int. L.Q. 69.

³⁵[1969] St.R.Qd. 378, affirmed on other grounds by the High Court of Australia (1970) 123 C.L.R. 418, Sub nom. Freehold Land Investments Ltd. v. Queensland Estates Pty. Ltd.

Briefly the facts of this case were that a contract was made in Queensland between a Queensland undertaking and a Hong Kong Company. The latter was doing business in Queensland as a real estate agent, and the contract involved the sale of some Queensland land to, amongst others, persons from Hong Kong. Queensland statute law required that real estate agents be licensed and provided for maximum rates of commission chargeable by real estate agents. The Hong Kong Company had charged excessive commission and was unlicensed. It was considered that in order to circumvent the Queensland law the parties had made Hong Kong law the proper law of the contract. Hoare J. held that their choice was not bona fide and that the law of Queensland was the proper law of the contract.

"I am satisfied that the attempted selection of this (Hong Kong) law was for no other purpose than to avoid the operation of the Queensland law. Under all the circumstances, I conclude that the purported selection of the Hong Kong law was not a bona fide selection."³⁶

In the second case³⁷ Campbell J. said, obiter³⁸

"The question is not one of jurisdiction which is not raised but what law should be applied. If the parties in this clause have indicated an intention that the law of Hong Kong is to govern the whole of their contractual relations they have expressed a choice unconnected with the realities of the contract"

Kelly³⁹ points out that whilst the decision reached in Golden Acres was not questionable the method of reaching it

³⁶[1969] St.R.Qd. 378 at p.385.

³⁷Queensland Estates Pty. Ltd. v. Collas [1971] St.R.Qd.75.

³⁸Ibid at p.80.

³⁹D. St.L. Kelly. International Contracts and Party Autonomy. (1970) 19 I.C.L.Q. 701 at p.702 et seq.

perhaps was. He says that even if Hoare J. had treated the parties' choice as effective the Queensland Act would not necessarily have been made inapplicable. The Queensland Act was obviously in force in Queensland and could have been applied notwithstanding the parties' choice of law.⁴⁰

Choice of a law unconnected with the contract
Capricious Choices

Another possible limitation on party autonomy is the question of whether the parties may choose a law to govern which is unconnected with their contract, in other words may the parties make a capricious choice or alternatively if not capricious one totally unconnected with the contract?

The matter has been controversial. Lord Wright⁴¹ said "connection with English law is not, as a matter of principle, essential." Morris⁴² has suggested that it could be possible that there could be sound financial or commercial reasons for choosing a governing law that appears otherwise unrelated to the contract. This is discussed in detail in the section on New York law.⁴³ At this point it may be noted that a large number of cases and a volume of academic writing may be cited to support the view that subject to the

⁴⁰As to the theoretical soundness of this argument see Kelly *ibid* at pp.703-4. See also J.L.R.Davis. A Note. (1970) 44 A.L.J. 80.

⁴¹Vita Food Products Inc. v. Unus Shipping Co. [1939] A.C. 277 at p.290.

⁴²Morris at p.273.

⁴³*Infra* at p.289.

'bona fide and legal' requirement the parties may choose any law they like. An equally large amount of judicial and scholastic statements support the view that this is not so.

Some illustrations

"It is open to the parties to stipulate in express terms that the law of a particular country shall apply. If they do so, that law is applicable."⁴⁴

"The legal principles which are to guide an English Court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract, if any, which will be conclusive."⁴⁵

Likewise in British Controlled Oil Fields v. Staggs⁴⁶ and Tzortzis v. Monarch Line A/B⁴⁷ laws were upheld which had no connection with the contract.

Stagg's case involved a Canadian company with a Branch office in London and an Ecuadorian citizen engaged in business in Ecuador for the sale of mineral rights in Ecuador. A clause in the contract read "it is agreed that whilst for convenience this agreement was signed by the parties in the City of New York, United States of America, it shall be con-

⁴⁴British South Africa Co v. De Beers Consolidated Mines Co. Ltd. [1910] 1 Ch.354 at p.381 per Swinfen Eady J.

⁴⁵Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft [1937] AC 500 at p.529 per Lord Atkin.

⁴⁶(1921) 127 L.T. 209.

⁴⁷[1968] 1 All ER. 949.

sidered and held to be one duly made and executed in London, England."⁴⁸ The plaintiffs, the Canadian company, invoked the jurisdiction of the English court and it was upheld that the clause quoted was an effective choice of English law and therefore of English jurisdiction.

In Tzortzis v. Monarch Line⁴⁹ Swedish sellers contracted to sell a Swedish ship to Greek buyers, deliverable at a Swedish port with payment to be made in Swedish money. The contract was in English and the money of account was sterling and a clause provided for arbitration in London. Disputes arose under the contract and were submitted for arbitration. The Arbitrators first considered the question of whether English or Swedish law was the proper law of the contract. The Arbitrators Award on this preliminary point was stated as a special case for the opinion of the Commercial Court and it was held "notwithstanding that the procedure may have an exclusively Scandinavian flavour, the parties, by inference, have indicated the choice of English (law) as the proper law of the contract."⁵⁰

Lord Denning⁵¹ said an express clause should be "conclusive in the absence of some public policy to the contrary."

However he had said some years earlier "I do not believe that parties are free to stipulate by what law the

⁴⁸(1921) 127 L.T. 209 at p.209.

⁴⁹[1968] 1 All E.R. 949.

⁵⁰However see later cases discussed infra at p.50 et seq.

⁵¹[1968] 1 All E.R. 949 at pp.951-2.

validity of their contract is to be determined. Their intention is only one of the factors to be taken into account."⁵²

Likewise in Re Claim by Helbert Wagg⁵³ it was stated that the court will not necessarily regard the intention expressed by the parties "as being the governing consideration where a system of law is chosen which has no real or substantial connection with the contract looked upon as a whole."⁵⁴

Academic writers have made similar observations. For example, Wolff⁵⁵ has stated most emphatically that the parties may subject their contract to any system of law with which it is internally connected. Hereby he says they make the selected territory the seat of their contract.⁵⁶ They cannot make a system of law with which the contract has no connection the proper law of the contract. If they nevertheless do just that, the proper law must be ascertained as if no law had been agreed upon and it must be further ascertained whether the law selected by the parties contravenes any compulsory provisions of the true proper law. Only in so far as this is not the case, does the law selected by the parties govern the contract.

⁵²Boissevain v. Weil [1949] 1 K.B. 482 at p.491.

⁵³[1956] Ch. 323.

⁵⁴Ibid at p.341 per Upjohn J.

⁵⁵Wolff. Op.cit. supra n.29 at p.119.

⁵⁶This reasoning is no longer popular.

Cheshire took this view and as Mann⁵⁷ notes, Cheshire emphasises his horror no less than ten times in the course of ninety pages at a theory which would allow the parties to choose any law in the world, even one with which the contract has no factual connection.

Cheshire & North state "The Courts should, and do, have a residual power to strike down, for good reason, choice of law clauses totally unconnected with the contract."⁵⁸ However they do not state their authority nor what that residual power is; possibly they are only referring to Lord Wright's view that the choice must be bona fide and legal and not contrary to public policy.

Of interest here are the views of Gamillscheg⁵⁹ who considers that a contract is a creation of the human mind and this creation is not to be bound to any fixed locality. If it is an international contract then Gamillscheg contends that the parties should have freedom to choose the law they wish. He gives an example of a German and an Argentinian making a corn contract which they make subject to English law. They do this not because they consider it to be an English transaction but because they want English law to govern their transaction. Whilst this is not a capricious choice as the parties consider the English law is

⁵⁷F.A.Mann, op. cit. supra n.34 at p.64.

⁵⁸Cheshire & North at p.202.

⁵⁹Gamillscheg's writings are listed on p.197 of Lando who summarises his views in English on p.144 et seq. See O. Lando . The Proper Law of a Contract (1964) 8 Scand. Studies in Law 107.

best suited to their agreement it is wholly unrelated to the contract. Yet would an English court uphold such a choice?⁶⁰ The answer must be yes.

The controversy returns to the basic conflicting views of the subjectivists and objectivists; this involves

"a debate which has provoked a spate of writing in volume so considerable and in quality of such scholastic finesse as to be almost reminiscent of a theological disputation among medieval schoolmen."⁶¹

Conclusion for this possible limitation

From a practical point of view it may be noted that there are no reported decisions where the parties have made a wholly capricious choice as defined by the judge deciding the case. Possibly the answer lies in the fact that persons involved in international transactions simply do not make such choices and thus the problem is of academic making and of undeniably academic interest only.

Alternatively it may be argued that "many matters are of world-wide import and 'located' in some particular place, such as the insurance and financing of various commercial transactions in London. Accordingly, it is not eccentric, it is not capricious, if a contract of this nature is subject to English domestic law even though there is no palpable connection with England."⁶²

⁶⁰Discussed infra at p.45.

⁶¹Webb & Brown at p.332.

⁶²P.R.H.Webb. The Conflict of laws and Contract (1985) at p.17 (hereinafter cited as Webb).

Gutteridge's⁶³ view that it is difficult to conceive of any case in which a purely arbitrary choice of law can be said to be made in good faith is another possible answer.

However despite the interest in this area for academic conflict of law scholars the fact remains that there are no decided cases on this aspect. Thus Lord Wright's views in Vita Foods⁶⁴ states the present law. Connection with England is not essential. This is also the law in New Zealand. Thus a choice unconnected with the contract is permissible. It is argued that this, whilst not only being the law, is the better view. If parties are to be allowed autonomy then there is no logical reason why this choice should be confined or restricted to choices that relate to the contract.

It is suggested below⁶⁵ that the only general restriction on party autonomy should be that of public policy. The use of the word legal by Lord Wright is ambiguous and a bona fide limitation has its difficulties. It may well have been a bona fide choice in a case such as Golden Acre Ltd. v. Queensland Estates Ltd.⁶⁶ If the result of the parties' actions is to avoid some consequence that would otherwise apply to their detriment it is easy to suggest that their actions are not bona fide. If the parties in Golden Acres Ltd. had not known of the Queensland legislation, but had chosen the law of Hong Kong nevertheless, it would be tempting

⁶³Gutteridge op. cit. supra n.28 at p. 323 et seq.

⁶⁴Vita Food Products Inc. v. Unus Shipping Co. Ltd. [1939] A.C. 277.

⁶⁵Infra at p.489 et seq.

⁶⁶[1969] St.R.Qd. 378

to consider their actions as not bona fide. It could be possible that genuine actions by parties could be misinterpreted. If the court considers that the parties' choice is not bona fide it may, in a Golden Acres situation, be adequately covered by the public policy limitation.

Summary to Rule I

The Vita Foods⁶⁷ case is the leading decision on express choice of law clauses. Parties may expressly choose a law to govern their contract subject to certain limitations. The choice must be bona fide legal and not contrary to the forum's public policy.

It is regrettable that there has been no "difficult" case since 1939 whereby this English rule has had to survive the "acid test"⁶⁸ of being used to validate a contract void by the law most significantly connected with it.

Whilst having stated the English law on party autonomy by discussing the first rule of the Proper Law doctrine, other exceptions to party autonomy do in fact exist, some of which are applicable in England. These further limitations are discussed after the New York law has been considered as they are exceptions which apply on both sides of the Atlantic.

⁶⁷Vita Food Products Inc. v. Unus Shipping Co. Ltd.
(1939) A.C. 277.

⁶⁸J. Prebble. Choice of Law to Determine the Validity and Effect of Contracts. A Comparison of English and American Approaches to the Conflict of Laws. Vol. 58 Cornell L. Rev. 433, 635 at p.497 (1973) (Hereinafter cited as Prebble.)

RULE II:Inferred ChoiceDefinition

"The intention may be inferred from the terms of the contract and the surrounding circumstances."⁶⁹

This second rule applies again where the parties have actually made a choice. The difference between the first and second rule is that in the first situation the parties have expressly stipulated a choice of law to govern their contract and have inserted such a clause in their written agreement. In this second situation the parties while having made a choice have failed to articulate it. In the words of Dicey & Morris⁷⁰

"When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and the nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract."⁷¹

At one time it was thought that the problem of inferred choice could be solved by means of an implied term in the contract. However it has been pointed out⁷² that this creates difficulties and Lord Reid held in James Miller

⁶⁹R. v. International Trustee for the Protection of Bondholders Akt [1937] A.C. 500 at p.529 per Lord Atkin.

⁷⁰Dicey & Morris at p.761.

⁷¹Ibid. Rule 145 SubRule 2.

⁷²James Miller & Partners v. Whitworth Street Estates (Manchester) Ltd. [1970] A.C. 583 at p.603 per Lord Reid.

&Partners v. Whitworth Street Estates (Manchester) Ltd.⁷³

that "the better view is now to apply a more objective test." Similarly Lord Wilberforce⁷⁴ in the same decision said "In my opinion, once it was seen that the parties had made no express choice of law, the correct course was to ascertain from all relevant contemporary circumstances⁷⁵ including, but not limited to, what the parties said or did at the time, what intention ought to be imputed to them on the formation of the contract."⁷⁶ Thus the rule here is that the parties' choice still prevails if it can be discovered. The choice may be said to be implicit.⁷⁷ The difficulty is to work out what law the parties had in fact had in mind when they entered their contract. As the litigants have not articulated their choice the court is in a difficult position. Traditionally a number of presumptions existed which if applicable to the contract under consideration were used to assist the court in inferring a choice. However presumptions in general are today out of favour⁷⁸ and indeed the development of some of them in recent years, as will be shown, has reduced their usefulness in the search for the parties' choice.

⁷³Ibid.

⁷⁴Ibid at p.614.

⁷⁵This test was recently applied in JMJ Contractors v. Marples Ridgway (1985) 31 Build. L.R.100 by Davies J.

⁷⁶See also Viscount Dilhorne [1970] A.C. 583 at p.611.

⁷⁷Webb & Brown at p.343.

⁷⁸See infra at p.60.

Various matters that have assisted the courts in applying this rule may now be stated.

Aids in Establishing Party Choice

Arbitration Clauses

Until the end of the nineteen sixties⁷⁹ the English courts had generally held that if the parties had agreed that arbitration should take place in a given country then the law of that country was intended to be the proper law of the contract. Numerous cases may be cited to illustrate this.⁸⁰

For example, in The Suisse Atlantique⁸¹ the only connection with England was the arbitration clause. The ship owners were Swiss, the charter Dutch and the contract concerned carriage of coal from the U.S.A. to Belgium, Holland and Germany. England appears to have been automatically assumed to have been the proper law of the contract because of the arbitration clause.

⁷⁹Until Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A. [1971] A.C. 572.

⁸⁰E.g. Hamlyn v. Talisker Distillery [1894] A.C. 202, Spurrier v. la Cloche [1909] A.C. 466, N.V. Kwik Hoo Tong Handel Maats-Chappij v. James Findlay & Co. [1927] A.C. 604.

⁸¹Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale [1967] 1 A.C. 361. However the case may also be explained by the fact that by not pleading foreign law parties can always make English law applicable to a contract unconnected in any way with English law because if foreign law is not pleaded, English law is applied. See Morris at p.271.

Similarly in Tzortzis v. Monarch Line A/B⁸² a contract was made and to be performed in Sweden for the sale of a ship by Swedish sellers to Greek buyers and there was no connection whatsoever with English law except that it contained a clause providing for arbitration in London. The Court of Appeal held that English law was the proper law of the contract.

Salmon J.⁸³ said that the arbitration clause "raises an irresistible inference which overrides all other factors." This may be seen as the high water mark for this presumption. The 1970's witnessed a marked change in attitude. In Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A.⁸⁴ a contract was made in France between French shipowners and a Tunisian company whereby the former agreed to ship oil from one Tunisian port to another. The contract was made on an English printed document. French law was the law in Tunisia. A clause in the contract provided for arbitration in London.

The House of Lords held that French law was the proper law and that the arbitration clause was merely one of the factors to be taken into account. "It would be highly anomolous if our law required the mere fact that arbitration is to take place in England to be decisive of the proper

⁸²[1968] 1 W.L.R. 406.

⁸³Ibid at p.413.

⁸⁴[1971] A.C. 572.

law of the contract."⁸⁵ "An arbitration clause" said Lord Wilberforce⁸⁶ "must be treated as an indication, to be considered together with the rest of the contract and relevant surrounding facts. Always it will be a strong indication But in some cases it must give way where other indications are clear." Thus the effect was that the arbitrator was bound to apply a different law from the law provided in the arbitration clause as the proper law.⁸⁷

Subsequent cases such as "The Mariannina"⁸⁸ support this view. It may be concluded that it is no longer true to say that in English law an inclusion of a standard London arbitration clause and, or, a submission to arbitration in for example London ensures application of English substantive law as the proper law to govern the contract.

"The Mariannina" illustrates the modern effect of arbitration clauses with regard to the second rule of the Proper Law doctrine. Lord Justice Ackner held that the arbitration clause was an important factor, and cited at length, and with approval the decision of Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A.⁸⁹ All matters must be considered.

⁸⁵[1971] A.C. 572 at p.584 per Lord Reid.

⁸⁶Ibid at p.600.

⁸⁷Clause 13 had specifically made the governing law the law of the flag of the vessel but a number of different vessels flying different flags had been used.

⁸⁸Astro Venturoso Compania Naviera v. Hellenic Shipyards S.A. ("The Mariannina") (1983) Lloyd's Law Rep. 13.

⁸⁹[1971] A.C. 572

On the facts of the case the fact that the contract stated that the Arbitration was to be in London "pursuant to English Arbitration Law"⁹⁰ was an indication that English law was the proper law. These two facts, neither conclusive in themselves, together made English law the chosen law.

Particular language as an aid to inferred choice

"..... [W]hen you have two men of business ... with a contract made in London, between English brokers and an English firm, who are not supposed to know German law, but who are supposed to know English mercantile law, with a contract made upon an English form, and on a printed form in common use; with a contract made with nothing but English phrases in it, and with a contract made with phrases peculiar to English contracts, what inference can be drawn All the circumstances together show that the intention was to make an English contract."⁹¹

It has been suggested⁹² that the use of terms such as "Act of God" or "Queen's Enemies" in a contract may suggest that English law was intended to govern. These two phrases are for example meaningless in German law.⁹³

The use of an English standard form⁹⁴ is however only a factor to be taken account of in assessing the

⁹⁰ (1983) Lloyds Law Rep. 13 at p.15.

⁹¹ The Industrie [1894] 58 at p.73 per Lord Esher M.R.

⁹² Dicey & Morris at p.762.

⁹³ See H.P. de Vries. International Contracts (1961) at p.19.

⁹⁴ For cases discussing the form of the documents used see Cheshire & North at p.205 footnote 4.

proper law. For example in Amin Rasheed Shipping Corporation v. Kuwait Insurance Co. Bingham J. at first instance said:

"The use of an English standard form may be a powerful, even conclusive, indication that the parties intended to contract with reference to English law But there is, in my judgment a factor here which cannot be ignored in assessing whether, and if so, how strongly, that inference should be drawn. The evidence in this case plainly establishes that this form of ruling policy, produced and developed on the London Insurance market, has achieved world wide currency. Partly this is due to the long history, the great experience, the professional expertise and the high standing of that market, combined with a traditional dominance of London as a Commercial centre. Partly it is due to the process of imperial fertilization which has led to the reproduction of the Marine Insurance Act 1906 in far corners of the globe the more international and generally used the reference (i.e. the standard form) is the less specifically English it becomes."⁹⁵

Two other recent cases have made similar observations. In one⁹⁶ the point was made that the English language was the lingua franca of commerce and the language of the United States of America and in the second case⁹⁷ the Court of Appeal in England held that the fact that the agreement was in English was of little weight as it was the language of shipping. The form of the contract did not point to English law as it was in world wide use.

⁹⁵[1982] 1 W.L.R. 961 at p.968.

⁹⁶In Armar Shipping Co. v. Caisse Algerienne d'Assurance et de Reassurance [1981] 1 All E.R. 498.

⁹⁷Monterosso Shipping Co. v. International Transport Workers Federation [1982] 3 All E.R. 841.

Other Matters

The effect of another English Court of Appeal decision⁹⁸ is that the commercial or legal connection between contracts may allow the court to say that the parties implicitly submitted both to the same law.⁹⁹ Through United States brokers contracts were entered into by a Panamanian ship-owning company and its sister companies. All the insurance policies contained a "Follow London" clause,¹⁰⁰ although they were negotiated in the United States and provided for payment of premiums and claims there. Some of the risk was placed on the London market (part of it through Lloyds) some on the United States market and some in Belgium, Greece and Japan.

It was held that the policies issued by the American insurer were governed by English law because the policies placed in the English market were governed by English law and the inference to be taken from the "Follow London" clause was that the United States policies would be governed by English law as well.

Dicey & Morris suggest that a contract making reference to for example a Scottish Statute, would presumably be taken

⁹⁸Armadora Occidental S.A. v. Horace Mann Insurance Co. [1978] 1 All E.R. 407.

⁹⁹ See Webb at p.27.

¹⁰⁰ The aim of such a clause is that negotiations on claims should be undertaken as first instance by e.g. Lloyds' underwriters or a British insurance company. See Webb at p.26.

to intend that it be governed by Scottish law even if its subject matter was situated in England and the person executing it be domiciled there.¹

Others matters have included the choice by the parties of a method of negotiating and financing a loan.² The fact that a form or wording of a contract has been approved or prescribed by the authorities of a given country or by the Head Office of a commercial undertaking with branches in a number of countries may be a pointer to the proper law.³ The residence of the parties, occasionally the nationality of the parties, the nature and location of the subject matter of the contract and the currency of payment have likewise been considered.⁴

Finally the parties' choice could be inferred from the theory that parties intend their contract to be valid. If there are two possible laws to choose from, then if a particular choice would render the contract void this choice is to be avoided.⁵

¹See Dicey & Morris at p.763 footnote 96 and cases cited e.g. Re Pilkington's Will Trusts [1937] Ch. 574 cf Lindsay v. Miller [1949] V.L.R. 13.

²Re United Railways of Havana etc. Warehouses Ltd. [1960] Ch. 52 affirmed subnom Tomkinson v. First Pennsylvania Banking & Trust Co. [1961] A.C. 1007.

³Anspach & Co. Ltd. v. C.N.R. [1950] 3 D.L.R. 26, and other cases cited by Dicey & Morris at p.763 footnote 99.

⁴See Cheshire & North at p.205 and footnotes 5-9 and p.206 footnotes 1-5 for relevant cases.

⁵This rule of validation is discussed below. See *infra* at p.399 et seq.

But as with Arbitration clauses all these considerations are merely indicators and must be considered in the light of all relevant circumstances. At the end of the day the assistance offered a judge is of little help.

"The only certain guide is to be found in applying sound ideas of business, convenience and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties."⁶

Summary to Rule II

The difficulties in establishing the parties' choice when they have failed to articulate their wishes are obviously considerable. The lack of presumptions leaves the court without any really useful aids. It is argued below that this rule should be abolished. If the parties may make a choice as to which law will govern their contract then so long as a rule exists for coping with situations where no choice has in fact been made there is no need for Rule II. It simply panders to parties who should have articulated their choice clearly in the first place.⁷

However the present English law is that the parties' choice will be upheld even though it is not explicitly expressed. The court will consider all relevant circumstances but will not rely on any predetermined presumptions.

⁶Jacobs v. Crédit Lyonnais (1884) 12 Q.B.D. 589 at p.601 per Bowen L.J.

⁷See *infra* at p.127.

RULE III:Law of Closest ConnectionDefinition

"The English courts will give effect to their choice unless it would be contrary to public policy to do so. But it is a liberty to choose - not a compulsion and if the parties do not exercise it as respects the proper law applicable to their contract the court will determine what is the proper law."⁸

If the parties have not included a governing law clause and if the court is unable to infer a choice then the contract is governed by the legal system with which the transaction has its closest and most real connection.

There will always be situations where parties do not give choice of law problems a thought. Many international contracts are oral; many such contracts are concluded by persons unaware of the fact that they are making a legally binding agreement. Not all international contracts are concluded by sophisticated businessmen or multinational corporations.

In this situation it cannot be said that the parties

⁸Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A. [1971] A.C. 572 at p.603 per Lord Diplock. See also James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd. [1970] A.C. 583 at p.611 where Viscount Dilhorne quoting Widgery L.J. in the Court of Appeal [1969] 1 W.L.R. 377 at p.383 said:

"Finally, if one is driven to the conclusion that the parties never applied their minds to the question at all, then one has to go to the third stage and see what is the proper law of the contract by considering what system of law is the one with which the transaction has its closest and most real connection."

have any common intention about a governing law. At most all that can be assumed is that the parties probably intended some binding agreement, but as Dicey & Morris⁹ point out in this context, if one did in fact ask the parties what law was to govern their contract they might quite likely have given different answers.

Traditionally there have been two views on what must be done when applying this third rule of the proper law.¹⁰

On one view

"The parties may not have thought of the matter at all. Then the Court has to impute an intention, or to determine for the parties, what is the proper law, which, as just and reasonable persons, they ought or would have intended if they had thought about the questions when they made the contract."¹¹

On the other view the court ignores the parties and applies the law which is the closest and has the most real connection to the contract. This is sometimes referred to as the Bonython test after the case of that name.¹²

"When the intention of the parties to a contract with regard to the law governing it is not expressed and cannot be inferred by the circumstances, the contract is governed by the system of law with which the transaction has its closest and most real connection."¹³

⁹Dicey & Morris at p.769.

¹⁰See F.A.Mann. The Proper Law in the Conflict of Laws. (1987) 36 I.L.L.Q. 437 at pp.444-5.

¹¹Mount Albert Borough Council v. Australasian Temperance & General Mutual Life Assurance Society [1938] A.C. 224 at p.240 per Lord Wright.

¹²Bonython v. Commonwealth of Australia [1951] A.C. 201.

¹³Rule 145 SubRule 3 Dicey & Morris at p.769.

The judge puts himself in the place of the reasonable man and determines the proper law for the parties. He does not attempt to attain the actual intention of the contracting parties because that is non-existent but "how a just and reasonable person would have regarded the problem."¹⁴

Cheshire & North¹⁵ point out that it is a "complete myth" to regard the ultimate decision by the judge as a fulfilment of the common intention of the parties. The judge is asked to decide at a time when both parties are at loggerheads as to the choice of law so "how can it be said with any approach to truth that the court, whichever way it decides the matter, will give effect to what both parties would presumably have accepted."¹⁶

The prevailing¹⁷ and better view is the latter test:

"The proper law of the contract (is) the system of law by reference to which the transaction has its closest and most real connection."¹⁸

However there are no reported decisions which have turned upon whether the court adopted the presumed intention test or the closest connection test. Probably the law with the closest and most real connection to the contract is very likely to be the law which just and reasonable persons may

¹⁴The Assunzione [1954] P.150 at p.176 per Singleton L.J.

¹⁵Cheshire & North at p.206 and see especially footnote 8 thereto.

¹⁶*Ibid.*

¹⁷Lord Diplock recently approved the test in the House of Lords in Amin Rasheed Corporation v. Kuwait Insurance Co. [1984] A.C. 50 at p.61. See also Du Pont v. Agnew [1987] 2 Lloyds Law Rep. 585 at p.592.

¹⁸Bonython v. Commonwealth of Australia [1951] A.C. 201 at p.219 per Lord Simonds.

be presumed to have intended to govern their obligations.

Application of the Test:

When applying this third test the judge may consider all the relevant circumstances. Morris¹⁹ suggests that the principal considerations are the place of contracting, place of performance, the places of residences or business of the parties respectively and the nature and subject matter of the contract.²⁰

However it has been suggested that reliance should not be placed on presumptions in favour of the *lex loci contractus* or *lex loci solutionis*, or indeed on presumptions in general.²¹

"To enter upon the search with a presumption is only too often to set out upon a false trail."²²

and

"Presumptions, once fashionable during the earlier development of English private international law, are now, whether for good or for ill, out of fashion and rejected."²³

¹⁹Morris at p.277.

²⁰See Re United Railways of Havana etc. Warehouses Ltd. [1960] Ch. 52 at p.91.

²¹All 3 Judges in the English Court of Appeal in Coast Lines Ltd. v. Hudig and Veder Chartering N.V. [1972] 2 Q.B. 34 at pp.44, 47, 50 disapproved of the use of presumptions.

²²Cheshire & North at p.210.

²³This was said in Coast Lines Ltd. v. Hudig & Veder Chartering N.V. [1972] 2 Q.B. 34 at p.47 per Megaw L.J. where it was held that the proper law of the charter party was English law as the law of the ship's flag. A number of other cases exist where the ship's flag, not being a flag of convenience, was applied. See for example those cases cited by Webb at p.42.

Cases to illustrate the application of the third rule

The court must consider all relevant factors or contacts (to use the American term). As it is impossible to list all such connections it is therefore considered appropriate to illustrate the third rule of the proper law by reference to actual decisions.

One well known example of the application of this Bonython test is Rossano v. Manufacturers' Life Insurance Co.²⁴ where the court held that Ontario law applied as the proper law to the transaction which involved three endowment policies all of which were associated with Ontario. It was noted that the defendant company had its head office in Ontario, that the form of policy was based on the law of Ontario, that despite Rossano, an Egyptian national resident in Egypt negotiating the contracts initially in Cairo he would never have got the policies if the Ontario head office had not approved. Finally the Court considered that generally a person contracting with a foreign insurance company does so because he has faith in it and the system of law under which it operates.

The Assunzione,²⁵ an English Court of Appeal decision, also illustrates this third rule. The case is the perfect example of a Court adding up all relevant factors to determine the applicable law. The facts were that a contract was

²⁴[1963] 2 Q.B. 352. Another example is Offshore International S.A. v. Banco Central S.A. [1977] 1 W.L.R. 399.

²⁵[1954] P.150.

made for the carriage of wheat from Dunkirk to Venice on board an Italian ship. The charterers were an organisation of French grain merchants. The wheat was shipped under an exchange agreement between the French and Italian Governments (but the Italian ship owners did not know this.) The contract was negotiated by correspondence between brokers in France and brokers in Italy. It was formally concluded in Paris in the English language and on an English standard form. Freight and demurrage was payable in Italian currency in Italy. The points in favour of applying French law were:

1. The contract was made in France. It was headed Paris, 1949.
2. It was written in English but had a French supplement.
3. The Bills of Lading were in French Standard form.
4. The Charterers were a French firm acting for the French Government (although the Italians did not know this.)

Matters favouring the application of Italian law -

1. The ship was Italian flying an Italian flag.
2. Italy was the place of performance where delivery was to be made.
3. The Bills of Lading were assigned to Italian Consignees.
4. The freight expenses were payable in Naples in Italian currency.

The English Court of Appeal had to use "a very delicate pair of scales"²⁶ in order to determine the proper law. It was unanimously held that Italian law was the proper law

²⁶Morris at p.277.

of the contract. The decisive factor was that both parties had to perform in Italy.²⁷

One of the most frequently cited cases on this third rule is the United Railways of Havana Case²⁸ a House of Lords decision. As with the Assunzione contacts could be made with a number of countries including England, Cuba and certain American states. The parties had agreed to submit to the jurisdiction of the tribunals of the City of Havana "for all notifications, summonses and other judicial or extrajudicial formalities to which this lease shall give rise."

As Webb²⁹ notes this clause concerned only ancillary matters and is not to be equated with a choice of law decision by the parties, and that the "obvious candidate" to be the proper law was one of the United States of America as only the security was situated in Cuba.³⁰

²⁷A trilogy of employment contracts likewise illustrates this test. See Sayers v. International Drilling Co. [1971] 3 All E.R. 163; Brodin v. A/R Seljar 1973 S.L.T. 213 and Coupland v. Arabian Gulf Petroleum Co. [1983] 3 All E.R. 226. In the last mentioned case the court held that despite the contacts with England the prevailing connection was with Libya, where, in effect, the contract was to be performed.

²⁸Re United Railways of Havana etc. Warehouse Ltd. [1960] Ch. 52 affirmed sub. nom. Tomkinson v. First Pennsylvania Banking & Trust Co. [1961] A.C. 1007.

²⁹Webb at p.28 and p.36.

³⁰Another recent example is XAG and others v. A. Bank [1983] 2 All E.R. 464.

Difficulties with the test

It must be noted that the test can be difficult to apply.

"Sometimes it is said that the test - and it is a very useful test - is: what system of law has the closest and most real connection with the contract? My difficulty is that I can find very little clue in the contract as to what the parties intended, and very little indication that the contract has a very real or close connection with any particular system of law."³¹

In this criticism and in Dicey & Morris³² the term 'system of law' is used.³³ In some cases a different phrase had been employed. For example in re United Railways of Havana etc. Warehouses Ltd.³⁴ Lord Denning had said "with what country has the transaction the closest and most real connection." However Lord Denning³⁵ in Whitworth Street Estates said that this had been a slip on his part; later in the House of Lords Lord Reid suggested that the two tests must be combined.³⁶ Morris³⁷ concludes that if a choice has to be made then the "system of law" is preferable, for as has been noted:

³¹Sayers v. International Drilling Co. [1971] All E.R. 163 at p.168 per Salmon L.J.

³²Rule 145 SubRule 3 at p.769.

³³For other cases see Cheshire & North at p.208 note 5.

³⁴[1961] A.C. 1007 at p.1068.

³⁵Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd. [1969] 1 W.L.R. 377 at p.381.

³⁶[1970] A.C. 583 at p.604.

³⁷Morris at p.270.

"To formulate the rule in terms of the closest connection with a particular country is to invite the unwary judge to give unwarranted weight to the locus solutionis, or in appropriate cases, to the locus contractus."³⁸

Generally the country with the closest connection will be the same as the system of law with the closest and most real connection but cases do exist where the difference could be important. One such case is James Miller & Partners v. Whitworth Street Estates (Manchester) Ltd.³⁹ All the legal factors in the case pointed to English law as the system of law with the closest connection whilst all the other factors pointed to Scotland as the country most closely connected. The case involved a Scottish company that had contracted to do alterations to an English company's premises in Scotland. The contract was standard form approved by the Royal Institute of British Architects.

The case went to the House of Lords which held that English law was the proper law of the contract. Whilst Lord Hodson⁴⁰ considered that variation in language between 'country' and 'system of law' as not important he does in effect admit the possible importance in the difference by noting many Scottish contacts before deciding the contract was governed by English law. Emphasis on the 'country' rather than the 'system' could have led to Scottish law

³⁸Prebble at p.667.

³⁹[1970] A.C. 583.

⁴⁰[1970] A.C. 583 at p.600.

being applied.

For example Lord Wilberforce⁴¹ considered that performance in Scotland was a "very weighty" fact which influenced his decision that the law of Scotland was the proper law of the contract.⁴²

It is suggested that Lord Reid's view⁴³ that both tests must be combined must prevail over those of Morris. If the country most closely connected to the contract is to be ignored and only the system of law considered then the complaint made by Salmon L.J.⁴⁴ will become more prevalent. If the English language is the lingua franca of the commercial world⁴⁵ and the English Standard Form merely a factor to be taken into account⁴⁶ then it may very well be difficult to find any indication that the contract has a close connection with any particular system of law.

⁴¹Ibid at p.615.

⁴²Another recent example is Amin Rasheed Corporation v. Kuwait Insurance Co. [1984] A.C. 50. The House of Lords held English law was the system of law with which the contract was most closely connected, and although they did not say so it is implicit that Kuwait was the country which had the closest connection with the contract.

⁴³James Miller & Partners Ltd. v. Whitworth Street Estates Ltd. [1970] A.C. 583 at p.604.

⁴⁴Sayers v. International Drilling Co. [1971] 3 All E.R. 163 at p.168.

⁴⁵Armar Shipping Co. v. Caisse Algerienne d'Assurance et de Reassurance [1981] 1 All E.R. 498.

⁴⁶See supra at p.53.

If Morris was correct in thinking that if a choice must be made it should be made in favour of "system of law" then all the geographic contacts would become irrelevant. Thus for example in Whitworth Street Estates⁴⁷ so many of the contacts considered should not have been mentioned at all if the country most closely connected is ignored. Lord Reid's views would thus appear to represent the present law.

Summary

This third rule is used only when the parties have failed to make a choice of law decision. The court must objectively determine which law is most closely connected to the contract. All relevant factors must be considered in the light of the particular transaction. Presumptions are out of favour and thus the court is left with really no guidance. It is the criticisms of the proper law doctrine that are next considered.

⁴⁷James Miller & Partners Ltd. v. Whitworth Street Estates [1970] A.C. 583.

Chapter III

CRITICISMS OF THE PROPER LAW DOCTRINE

"I have found no basis either in the cases or elsewhere for any theory capable of explaining the whole field of the conflict of laws respecting contracts."¹

In the previous pages the three rules which together form the English proper law doctrine have been outlined. The law applied to contracts with contacts with more than one jurisdiction appears to be relatively easy to state. If the parties make an express choice of a governing law to determine their agreement then subject to some general exceptions the court will honour the parties' choice. Even if the parties have not articulated their choice the court will still uphold a choice if the judge can elicit the parties' intention. If this is impossible then the judge will apply that system of law which has the closest and most real connection to the contract.

It would be reasonable at this point to illustrate the operation of the proper law doctrine by reference to specific contractual issues. Indeed all the major text books do this. It would be reasonable to assume that this proper law doctrine was to be applied to the particular topics that the text books discuss. Some exceptions to the proper law doctrine might be considered justifiable given that it is always difficult to have a rule to cover

¹O. Lando. The Proper Law of the Contract (1964)
8 Scand. Studies in Law 107 at p.110.

every aspect or eventuality, especially in an area as diverse as international contracts. However when one attempts to find two or three topics to demonstrate the application of the proper law rule in English cases a remarkable state of affairs presents itself. In many areas there are no relevant English decisions at all. Furthermore in areas where litigation has occurred the exceptions and alternatives given to the proper law doctrine effectively deprive the doctrine of much of its force. These two aspects are now considered in detail.

Lack of Judicial Decisions indicating lack of usefulness of the doctrine

The first matter to consider is the dearth of judicial decisions in particular areas. If one considers the topics of offer, acceptance, consideration, mistake, misrepresentation, duress and undue influence, privity and capacity only a handful of reported decisions can be found.²

The reasons for the lack of case law in these areas must be speculative. Does the proper law doctrine work

²On offer and acceptance see Albeko Schumaschinen v. Kamborian Shoe Machine Co. Ltd. (1961) 111 L.J. 519. For consideration see Re Bona Cina [1912] 2 Ch. 392. For mistake see Mackender v. Feldia [1967] 2 Q.B. 590 and The Parouth [1982] 2 Lloyds Law Rep. 351. For Privity see Scott v. Pilkington (1862) 2 B & B 11. It may also be noted, in passing, that these cases are not particularly helpful anyway. Much of the discussion on the proper law is obiter, and many of the fact situations are not good illustrations. For example in Albeko's case, ibid, no letter of acceptance was posted, in Mackender v. Feldia, ibid, the discussion is obiter.

so well that litigants can work out in advance the definite result a court would come to and thus save themselves the time and expense of actual litigation? It would seem unlikely.³ All that may be said is that in some very important areas of contract law there is a dearth of judicial decisions to illustrate the workings of the proper law concept in private international law for contracts. If the concept was a useful working tool to resolve contractual conflict problems surely it would have been utilised more frequently over the years? One would have expected an appreciable body of case law to have materialised by this time if the proper law doctrine was in fact the panacea that the leading English text book writers would claim it to be.

The existence of other conflict of laws concepts to resolve contractual issues.

There appears to be a contradiction in the major English text books when particular topics of contract law are discussed. On the one hand one finds statements such as "the English doctrine of the proper law is one of the outstanding contributions made by English lawyers to the general science of the conflict of laws"⁴ and on the other hand the very same writers are unable to apply this proper

³Begg, in the context of consumer credit transactions suggests that cases are not litigated because of the costs involved. See S. Begg. Conflicts Problems in Consumer Credit Transactions. (1985-86) The Adelaide L.R. 138 at p.139.

⁴Morris at p.281.

law to actual contractual issues. English academics have had to develop concepts besides that of the proper law doctrine to resolve choice of law issues. If the proper law doctrine was all it was claimed to be these writers would be able to apply the proper law to the fact situations they have had to create because of the unavailability of illustrative case law.

All the major areas of contract law are briefly canvassed in the following pages. Whilst some aspects or topics are inherently more interesting than others (Danish boat builders and questions of offer and acceptance being of particular interest)⁵ all topics are discussed albeit in varying degrees of detail. If only certain topics had been chosen this could have given a biased result, indeed some topics illustrate more than others that the proper law is not omnipotent. By discussing all major areas it can be seen that the conclusions to be drawn do apply in all areas of contract law. These conclusions are that there are really very few cases and that other conflict concepts have had to be utilised, especially by academics, to resolve issues.

Some conflict of laws scholars make much of the difference between the creation of a contract and its validity. Some writers⁶ consider that rule one of the

⁵See Morris at p.283 and Wolff cited by Dicey & Morris at p.776.

⁶See e.g. Weintraub *infra* at p.402.

proper law for example can have no part to play in the actual creation of a contract and thus limit its operation to the validity of the agreement. Other writers do not make such distinctions. It is to be argued that this latter approach is preferable,⁷ party autonomy can and should prevail when any issue arises. However a discussion of all major contractual issues shows that whilst the proper law is not exclusively dominant in any area it is relegated to a very minor position when the creation of a contract is considered.

The first matter considered is thus that of offer and acceptance. This is a particularly interesting field for conflict of laws scholars as the various solutions to the problems of offer and acceptance in an international setting highlight. This discussion illustrates the use of other concepts besides that of the proper law. The discussion on illegality reinforces these conclusions and also demonstrates that the law can be difficult to apply.

The same conclusions can be drawn when all the other aspects of contract law are considered. Thus the discussion on capacity, formal validity, construction and interpretation reinforce the previous conclusions.⁸ The brief discussion on the effects of a contract serve to reiterate that which has been stated before. In other words whatever

⁷See *infra* at p.486 et seq.

⁸Thus the first five rules on specific topics (Rules 146-150) of Dicey & Morris have been considered.

aspect of contract law one chooses it demonstrates a lack of omnipotence in the proper law doctrine.⁹

Offer and Acceptance

There is only one decision directly on offer and acceptance in English conflict of laws which is but briefly and obscurely reported and contains an unhelpful fact situation.¹⁰ This area of law has however received much academic attention and is used here to illustrate the fact that the proper law cannot provide an adequate solution to questions of offer and acceptance. The writers have had to introduce other concepts to resolve issue or have had to create others.

The first concept to consider is that of the Putative Proper Law.

Offer and Acceptance and the Putative Proper Law¹¹

The Putative Proper Law defined

It has been suggested that if the choice of a proper law has been expressly made in the contract it can only be effective if the contract is valid. A question as to the existence of the contract necessarily places in issue also the effectiveness of the choice. In deciding whether

⁹Morris' discussion of topics is misleading because he divorces illegality from essential validity. See Morris at p.291.

¹⁰Albeko Schuhmaschinen v. Kamborian Shoe Machine Co. Ltd. (1961) 111 L.J. 519.

¹¹See generally Morris at p.282, Cheshire at p.55 et seq. See also H.J.E.Jaffey. Offer and Acceptance and Related Questions in the English Conflict of Laws. (1975) 24 I.C.L.Q. 603 and P.S.C.Lewis. The Formation of a Contract. (1961) 10 I.C.L.Q. 908 at pp.909-10 and D.F. Libling. Formation of

there is a valid contract there is therefore a logical absurdity according to some writers in referring to the chosen proper law.¹² Thus the concept of the Putative Proper Law has been developed. Morris¹³ defines this as "the law which would have been the proper law of the contract if it had been concluded."

Dicey & Morris Rule 146¹⁴ states:

"The formation of a contract is governed by that law which would be the proper law of the contract if the contract was validly concluded."

It may also be called the "potential" proper law.¹⁵

Cheshire & North state

"On principle, it seems clear that the question whether agreement has been reached should be submitted to the putative proper law, i.e. the law that would be the proper law in the objective sense assuming that the contract had been effectively created."¹⁶

They continue

"It seems only rational that the valid creation of a contract, a matter upon which the parties are not free to choose the governing law, should be determinable in all its aspects by a single legal system."¹⁷

Whilst Dicey & Morris do not frame their rule objectively they do state that "it seems that, in determining

International contracts. (1979) 42 M.L.R. 169, and A. Thomson. A Different Approach to Choice of Law in Contracts (1980) 43 M.L.R. 650 at p.651 et seq.

¹²See Thomson *ibid* at p.651 especially notes 10 and 11.

¹³Morris at p.282.

¹⁴Dicey & Morris at p.775

¹⁵Webb at p.7.

¹⁶Cheshire & North at p.216.

¹⁷*Ibid*.

the putative proper law, an express choice of law by the parties will be disregarded.¹⁸

Dicey & Morris cite as their authority for their definition Cheshire & North, who in turn state that Albeko Schuhmaschinen v. The Kamborian Shoe Machine Co. Ltd.¹⁹ "is strong, though only persuasive, authority for this view." They cite the facts and summarise Salmon J.'s decision but they do not show why they consider Albeko supports application of the putative proper law objectively determined.²⁰

Finally Morris²¹ uses the language of Rule 146 and cites as his authority²² Dicey & Morris and Cheshire & North above; thus presumably adhering to the objectively determined putative proper law. He also cites Wolff²³ but Wolff does not discuss how to determine the putative proper law on the page given²⁴ as the reference by Morris.

¹⁸Dicey & Morris at p.777.

¹⁹(1961) 111 L.J. 519.

²⁰Cheshire & North at p.213 state "that autonomy has no place in the choice of a law to govern the creation of a contract is generally agreed" and they go on to cite three cases, see p.213 footnote 3, which states parties cannot by their choice avoid a peremptory rule otherwise applicable; however these cases do not say that parties cannot otherwise choose a law to govern their transaction.

²¹Morris at p.282.

²²Ibid at footnote 98.

²³Ibid.

²⁴Ibid, Morris cites Wolff at p.439.

Disadvantages of the Putative Proper Law

1. Can Produce Injustice

Having created the 'putative proper law' which appears to be merely the third rule of the proper law doctrine the same group of writers cannot but fail to note that it is far from satisfactory. Wolff²⁵ gives the example of a Danish merchant making a written offer to an English merchant with whom he has had previous dealings. In this offer is a clause stating that the contract shall be governed by Danish law. The English party does not answer.

"Can his silence be interpreted as acceptance because, under Danish law, it would be regarded as such, and because the letter referred to Danish law? It cannot.

The silence of a person can be deemed to be an act of legal significance only if that is so under the law of that person's residence or place of business."²⁶

²⁵M. Wolff. Private International Law (1950) (2nd Edit.) at p.439, cited by Dicey & Morris at p.776 and Morris at p.283. The putative proper law is also criticised in this context by P.S.C. Lewis op.cit. supra n.11 at pp.909-10.

²⁶Ibid. In the words of Morris at p.283 an enterprising Dutch yacht builder writes a letter to a well-known English yachtsman offering to build a yacht for him in Denmark. The Englishman puts the letter in his waste-paper basket and does not reply to it. By Danish law, silence on the part of the offeree amounts to an acceptance of the offer. By English law it does not. It would surely be wrong, Morris says, to hold the Englishman liable, even though Danish law is the putative or proper law.

2. Cannot determine certain issues

If one employs Cheshire & North and Morris' definition the question of where a contract is made is not resolvable by reference to the putative proper law (as defined by those writers).²⁷

Let us suppose that A is in Germany and B is in England and that A in his offer to appoint B his agent, fixed all the important terms of the contract and included a clause stating that the proper law be that of New York and that B was to act as A's agent in Scotland. In the lost acceptance B agrees to all A's terms. A not having had a reply from B appoints D as his agent. B brings an action in England. The objectively determined putative proper law does not help at all in determining whether the agreement is complete. Given that the express choice must be ignored, as must the second rule concerning inferred choice the court would have to use the rule applying the law of the closest connection. How would a "just and reasonable" person determine the question? Presumptions are out of favour,²⁸ so the *lex loci contractus* is not to be given undue weight nor is the *lex loci solutionis*, thus the law

²⁷Cheshire & North at p.216 give the following example.

"A mails an offer in London to B in Hamburg; B mails an acceptance in Hamburg but his acceptance is lost. By English law there is a completed agreement, by German law there is not."

They say that the governing law would depend upon whether the contract, assuming its existence, would be more closely connected with England or Germany.

²⁸Supra at p.60.

of Scotland must not be over emphasised. It could be decided that the laws are equally balanced and a reasonable person might conclude that the problem is insoluble by the putative proper law. Alternatively one could argue that a reasonable businessman would apply the law of New York; there appears to be no other sensible alternative. Even if one makes A and B English and German without any connection whatsoever with New York it still seems a reasonable solution and as parties do not tend to make capricious choices there would probably be a good reason for A suggesting New York as the proper law anyway.²⁹

Thus the proper law (putative or not) does not solve the question. It is impossible to tell whether the contract (assuming its existence) is more closely connected with England or Germany, New York or Scotland. The objectively determined putative proper law does not assist the enquiry in any way whatsoever.

To conclude it would seem that there is no judicial authority for the objectively determined putative proper law to apply to questions of offer and acceptance. Secondly as a choice of law rule for resolving problems in this field it is not only unhelpful but as the academics who

²⁹Such as the fact A is a resident of New York, and uses a New York law firm. He could reasonably be in Germany (or England) on business only.

created the concept have pointed out it can produce unsatisfactory results.³⁰

Alternative solutions to the concept of putative proper law to determine questions of offer and acceptance

A number of academic solutions have been suggested in this area.

1. Application of the lex loci contractus as determined by the lex fori to establish validity of agreement

Cheshire considered it "a little artificial" to rely on the putative proper law before it is known whether the parties have ever reached agreement. Moreover it may be difficult to determine what the proper law is until it has been settled where the contract was made, "for this place constitutes one of the important elements, in fact the most important, on which the question turns."³¹

He likewise rejected the lex loci contractus theory. Taken literally, he said, this suggestion is of course absurd. "For if the enquiry is whether any agreement was reached, it is begging the question to refer to the place where it was reached."³²

Cheshire³³ concluded that a reasonable solution is to

³⁰See generally P.H. Winfield. Some Aspects of Offer and Acceptance (1939) 55 L.Q.R. 499.

³¹Cheshire at p.53 et seq.

³²Ibid.

³³Ibid.

apply the *lex loci contractus* and to leave it to the *lex fori* to identify the *lex locus contractus*.³⁴ English law must put its own interpretation on the expression the *lex locus contractus*. In other words it is for English law to decide where the last act is upon which the completion of agreement depends. "The decision should be reached on the basis that it is required for a conflicts of laws case but it so happens that the English courts have not developed a theory on the matter, especially adapted to international contracts. They have been content to adopt the domestic test of the place of posting."³⁵ Cheshire considered this unfortunate; he notes that the posting rule in English law is arbitrary and was not designed for conflict of law cases. He concluded in 1948 that English courts will determine the fact of agreements by the *lex loci contractus* and will establish the *locus contractus* by applying the relevant tests recognised by their domestic laws. This solution, however, he said, is not satisfactory, since the decision of a disputed question of agreement will vary with the forum in which the action is brought.

³⁴Cheshire suggested this was the English view in 1948. Ibid at p.56.

³⁵This appears from the Privy Council decision of Benaim & Co. v. Debono [1924] A.C. 514; where an offer to sell anchovies sent by the appellants from Gibraltar was accepted by a cable handed in by the respondents in Malta. The Privy Council held that the contract had been made in Malta and in that case the Court was sitting as a Maltese Court of Appeal and strictly speaking was laying down a rule of Maltese private international law. "Nevertheless there is little doubt that had the action for breach of the contract been brought in England, the High Court would have taken the same view." Cheshire at p.56. However the issue in the case was whether the buyer had the right to rescind the contract, not whether the parties had reached agreement.

Cheshire thus resolves the problem of where a contract is made by use of the *lex fori* and the *lex loci contractus*. The proper law whether or not putative is ignored.³⁶

Application of the law of a person's residence or place of business to determine where a contract is made

Wolff³⁷ suggested this possibility in the context of his Danish and English merchant example. The relevant person is the person who is silent. In other words the matter is resolved by reference to the acceptor's place of residence or place of business.

It is suggested that a general rule is needed to resolve the choice of law issue, whether it be a matter that involves formation or validity. Detailed rules of limited applicability tend to make the law difficult to find and to apply and for this reason should not be developed. Cheshire's 1948 ideas suffer from the same disadvantage.

³⁶It may be noted in passing that since 1948 Cheshire would appear to have changed his mind. On p.216 of Cheshire & North Cheshire endorses application of the putative proper law. This view also appears in the 9th edition of Cheshire's Private International Law which as North pointed out in the Preface (p.v.) still involved Cheshire.

³⁷Wolff p.cit. supra n.25.

Application of forum law to determine where a contract is made.

On the question of where a contract is made, Webb³⁸ suggests that "the only satisfactory way out of the dilemma is for the forum to decide by its own domestic law."³⁹

The problem however remains when the forum has not by its domestic law settled the matter in question.⁴⁰

'Offer and Acceptance' decided by reference to the personal law of the parties, and to the lex fori.

Jaffey⁴¹ considers that the question of whether the parties should be held to have reached agreement is essentially a problem of achieving justice between the parties. "The rules of offer and acceptance of any particular domestic system of contract represents the notions of justice worked out by that system."⁴² Where the contract is an international one, the question is which country's or countries' notions of what is just as between the parties should be applied. Looked at this way, the law of the

³⁸Webb at p.5.

³⁹English domestic law has for example decided that instantaneous means of communication such as telex results in the contract being completed where and when the offeror receives the acceptance. Entores Ltd. v. Miles Far East Corporation [1955] 2 Q.B. 327 and Brinkibon Ltd. v. Stahag Stahl [1983] 2 A.C. 34. In the latter case a telex was sent from London to Vienna where by an English company agreed to buy some steel bars from Austrian sellers. The House of Lords held that the contract had been made in Austria this being the place where the offeror had received the acceptance.

⁴⁰Webb at p.6.

⁴¹Jaffey op. cit. supra n.11.

⁴²Ibid at p.609.

country to which a party belongs, resides, carries on business will become relevant.⁴³

Jaffey gives two examples:

"1. X contends that Y is bound while Y contends that he, Y, is not bound. By the law of X's country, Y is not bound, but by the law of Y's country Y is bound. Here it is suggested that Y should be held bound. He has no cause for complaint if the law of his own country is applied. It may be that X is not bound by the law of his own country but that is hardly to the point if X wishes to be bound (where in such a case one party submits that the other is bound he must necessarily expect that he himself is bound). Where one party wishes to be bound and the other is bound by the law of his own country, it seems right to hold that there is a binding contract.

"2. X contends that Y is bound but Y contends that he is not bound. By the law of X's country Y is bound but by the law of Y's country Y is not bound. Here there is a conflict which cannot be resolved between the notions of the parties' countries as to what is just as between them. The solution it is suggested, is to apply the *lex fori* (which of course may well be the law of one of the parties) on the grounds that where there is no reason to prefer any other country's notion of justice in a particular case, the Court should apply its own."⁴⁴

Jaffey next considers Albeko⁴⁵ on the assumption that a letter of acceptance was posted and assuming that when

⁴³However it could be argued that to say that the rules of offer and acceptance of any particular domestic system of contract represents the notions of justice worked out in that system is in a sense incorrect. The rule in English domestic law that acceptance is complete on posting is arbitrary and from the point of view of justice to the parties it might just as easily be that acceptance is complete when received by the offeror. It is however just in the sense that it is an established rule by which all parties must abide.

⁴⁴Jaffey op. cit. supra n.11 at p.610.

⁴⁵Albeko Schumaschinen v. The Kamborian Shoe Machine Co. (1961) 111 L.J. 519.

the laws of both parties' countries produce the same results they should be applied. Otherwise a party who contends that he is not bound will be held bound if he is bound by his own law, or, if he is not bound by his own law, he will nevertheless be held bound if he is bound by the other party's law and the *lex fori* (which may in a given case be the other party's law)."⁴⁶

The difficulties of offer and acceptance are resolved by Jaffey without any reference to the proper law doctrine. It is suggested that his conclusions concerning Albeko⁴⁷ are unnecessarily complicated. Assuming again that the letter of acceptance was posted the party autonomy rule can apply and no injustice is done. If the choice of law clause specified English law as the governing law then the Swiss offeror having accepted the offer is bound by the English law. There is nothing unjust about this. The English offeree wanted and expected the contract to be governed by English law and the Swiss party has accepted this. He knows he is being governed by a law which is not his own. If he later finds that this results in some unexpected legal consequence he has only himself to blame. He should have considered the content of English law before committing himself to the agreement.

If the English offeror had specified Swiss law to

⁴⁶Jaffey op.cit. supra n.11 at p.610.

⁴⁷Albeko Schumaschinen v. The Kambolian Shoe Machine Co. (1961) 111 L.J. 519.

govern the contract then there is nothing unjust about a court applying Swiss law to govern the situation. Again the English offeror must have suggested Swiss law and again the Swiss party must have agreed to this choice of law. Neither party can complain if Swiss law is applied, it is not unjust, both parties have agreed on a law and that law should be upheld.

Had the parties agreed on the law of a third state then so long as the offeree agrees to this choice suggested by the offeror the same conclusion results.

Jaffey makes the law too difficult in situations where a choice of law clause exists.

If no choice of law clause is present, then in Jaffey's second example above the *lex fori* should apply but not necessarily for the reasons given by Jaffey. If the parties have not exercised their right to determine the law to govern their contract they cannot complain if the choice is made for them. Assuming that there was no governing law clause in Albeko's⁴⁸ case the *lex fori* arrives at the same results as Jaffey achieves but via a much straighter path. If the Swiss offeree contends he is not bound he will be bound by the English *lex fori*. This is the result Jaffey came to in his final fact situation above.

⁴⁸Ibid.

Offer and Acceptance decided by reference to both the lex fori and the Putative Proper Law

Libling suggests a solution would be to allow classification⁴⁹ by the lex fori and determination of validity by the putative proper law. Libling says it is wrong to ask initially whether there is a valid contract according to the putative proper law. The preliminary question must be asked as to whether the transaction satisfies the English forum's requirements for classification as a contract. If the answer is yes then the putative proper law is applied to determine whether a legally enforceable contract has been formed.⁵⁰ Libling considers that if the problem of classification is dealt with the "undesirable features of putative proper law" are eliminated. The lex fori having classified the problem as contractual can then use its conflict of laws rule to refer questions of validity to the law of whichever

⁴⁹Classification is an internal problem. The lex fori must classify the agreement as contractual before its conflict of law rules concerning contracts are applicable. Characterisation applies after classification. Having established a contract by classification characterisation of specific issues takes place. Libling op.cit. supra n.11 at p.173 note 21 gives the example of an infant entering into an agreement, the matter would be classified as a contract and then the question arises as to whether infancy is a question of status and thus for the law of his domicile or a question of capacity and thus for the proper law. This latter problem of characterisation is arguably not an exclusive province of the lex fori according to Libling. Libling considers that in order to classify a transaction as a contract not every element required of a contract by English law need be present. What is required is that the "essence" of the English concept of contract is present. And these, Libling suggests, are intention to create legal relations and agreement.

⁵⁰Libling op.cit. supra n.11 at p.173 note 17 defines putative proper law as the law by which the parties intended their contract to be governed or in the absence of a discernable intention the system of law with which the contract has its closest and most real connection.

is the appropriate legal system.

One may criticise Libling by suggesting that given that the problem has been classified as one relating to offer and acceptance then there is no need to refer to a putative proper law, however defined.⁵¹ The problem can be solved by reference to party autonomy and the *lex fori*. To return to the example of the Dane and the Englishman, if the Danish yachtbuilder specified Danish law then an English forum could hold that the parties had not agreed on a governing law; if the Dane had specified English law then the Englishman is protected by English law and there is no contract. If no choice of law clause existed, the Englishman is still protected because the *lex fori* would hold that no contract existed.

The conclusion is that nothing is gained by introducing difficult tests into the choice of law area. Nor is the "confusing"⁵² putative proper law doctrine a useful concept. However, to return to the main consideration. Concepts besides that of the proper law are used by courts and academics and this, together with the number of exceptions that have arisen to the proper law doctrine, undermine its omnipotence and severely limit its usefulness. This must be further considered.

⁵¹Indeed his definition of the putative proper law is really only that of the proper law doctrine with Rules 1 and 2 amalgamated.

⁵²Mackender v. Feldia [1967] 2 Q.B. 590 at p.603 per Diplock L.J.

Morris⁵³ has said that "[i]n matters of essential validity the proper law is omnipotent". The following discussion suggests that the doctrine is so hedged in with exceptions and other concepts that this statement is not maintainable. Illegal contracts may be used to demonstrate this contention.

Use of Other Concepts Besides that of the Proper Law
illustrated by Reference to Illegality

The topics of offer and acceptance illustrated the putative proper law concept and the need felt by academic writers to introduce other concepts to resolve issues.

When illegality is considered one finds a number of reported decisions but again considering the ever increasing likelihood of entering an illegal contract the case law is scant. With the advent of increased legislation it is becoming correspondingly increasingly easy to break some regulation as the number of reported domestic decisions on illegal contract demonstrates. There has not been a corresponding increase in international illegal contracts - again suggestive that the proper law doctrine is not a useful tool.

Dicey & Morris' rule 149⁵⁴ although couched in terms

⁵³Morris at p.291.

⁵⁴"The material or essential validity of a contract is (subject to the Exceptions hereinafter mentioned) governed by the proper law of the contract.
Exception 1. 'A contract (whether lawful by its proper law or not) is, in general, invalid so far as the performance of it is unlawful by the law of the country where the contract is to be performed (lex loci solutionis).'
Exception 2. 'The validity or invalidity of a contract must be determined in accordance with English law, independently of the law of any country whatever, in so far as the

of the proper law doctrine is, on examining the exceptions and case law, consumed by these two exceptions. Cheshire & North⁵⁵ give five propositions to illustrate the law here and these likewise are hedged with exceptions to the proper law doctrine.

The first rule states that "contracts that are illegal by their proper law cannot be enforced in England."⁵⁶ Dicey & Morris⁵⁷ point out in this context that the rule which allows legality to be determined by the proper law appears to lead to the "startling and quite intolerable" result that parties can by their choice give validity to an agreement which could otherwise be void, and so could lead to law evasion and frustrate attempts to unify substantive commercial law; they argue that in fact this is not so. They consider that a "bold"⁵⁸ application of Lord Wright's⁵⁹ statement that the choice must be bona fide and the limitations imposed by the other Rules on illegality

application of foreign law would be opposed to the public policy of English law.'

Dicey & Morris at p.789 et seq.

⁵⁵Cheshire & North at p.224 et seq.

⁵⁶For an example see Zivnostenska Banka v. Frankman [1950] A.C. 57 and Kahler v. Midland Bank Ltd. [1950] A.C. 24.

⁵⁷Dicey & Morris at p.792.

⁵⁸Ibid.

⁵⁹Vita Food Products Inc. v. Unus Shipping Co. Ltd. [1939] A.C. 277 at p.290.

put the above criticisms in their proper context. They also note that "there does not appear to be any case in which a contract, illegal in its entirety according to the law most closely connected with it has been upheld by reason of the parties' choice as the proper law of a legal system by which it was valid."⁶⁰

Rule (ii) "Secondly no action lies in England upon a contract that infringes the distinctive public policy of English law, as *lex fori*."⁶¹ Here the contract may be either valid or invalid by the proper law of the contract.⁶² It should be noted that this situation produces an unenforceable contract.⁶³

Cheshire & North⁶⁴ cite Boissevain v. Weil⁶⁵ to illustrate the interrelationship of these two rules. The facts of the case were that an English lady resident in Monaco in 1944 borrowed money to save her Jewish son from the Gestapo. She borrowed French francs from a Dutch subject who was likewise resident in Monaco. She agreed to repay the loan in London at a set rate as soon as possible after the war. She also gave the Dutch lender cheques worth six thousand pounds, drawn on a London bank asking the manager to honour the cheques as soon as legally possible.

⁶⁰Dicey & Morris at p.792.

⁶¹Cheshire & North at p.224. Morris. Proposition (2). Dicey & Morris Exception 2 to Rule 149.

⁶²Cheshire & North at p.224.

⁶³Mackender v. Feldia, A.G. [1967] 2 Q.B. 590 at p.601 per Lord Diplock.

⁶⁴Cheshire & North at p.224.

⁶⁵[1950] A.C. 327.

(She did not in fact have an account at the bank). The loan contravened wartime legislation making it an offence to buy or borrow sell or lend any foreign currency.

The Court of Appeal⁶⁶ and House of Lords⁶⁷ agreed for different reasons that the loan was irrecoverable. In the Court of Appeal Tucker L.J.⁶⁸ held that the legislation had extra-territorial effect and that she came within its ambit. Denning L.J.⁶⁹ held that English law was the proper law and that illegality by the proper law meant the borrower could not recover. Lord Radcliffe⁷⁰ emphasised the imperative nature of the regulation and stated that these matters could not hinge on what law was the proper law.

The *lex fori* is at least equal if not paramount when these two rules are considered. Rule 1 can be seen not in terms of omnipotence for the proper law but rather as a matter for determination by the English forum. It is the English forum applying English law which determines whether or not to uphold the particular contract rather than it being in a subservient position *vis à vis* the proper law.

Again with the second rule it is the forum and its policy which is dominant.

⁶⁶[1949] 1 K.B. 482

⁶⁷[1950] A.C. 327

⁶⁸[1949] 1 K.B. 482 at p.488

⁶⁹[1949] 1 K.B. 482 at p.491.

⁷⁰[1950] A.C. 327 at p.344. The other Law Lords agreed.

These two rules require that the proper law be ascertained. This is by no means an easy task as Boissevain v. Weil⁷¹ illustrates. The proper law could easily have been that of Monaco or England.⁷² This criticism of the proper law doctrine is taken up below.

If the first two rules are difficult to apply and are dominated by the lex fori the third rule should hardly need stating if the proper law dominated.⁷³

Morris has stated that

"It is generally inadvisable, in modern conditions of commerce, rigidly to apply the lex loci contractus to any problem affecting the existence, validity or interpretation of a contract."⁷⁴

and Dicey & Morris⁷⁵ note that a contract void by its proper law will be regarded as void by an English court although valid by the lex loci contractus.

These type of statements are not in keeping with the idea that the proper law governs. One wonders why Morris saw fit to even mention the matter.⁷⁶

⁷¹[1950] A.C. 327.

⁷²See F.A. Mann. The Proper Law of the Contract. A Rejoinder. (1950) 2 The Int. L.Q. 597 at p.602.

⁷³Rule 3 states: "A contract that is valid by its proper law does not become unenforceable in England merely because it is illegal according to the lex loci contractus.

⁷⁴Morris at. p.289.

⁷⁵Dicey & Morris at p.790.

⁷⁶Rule 3 is illustrated by Re Missouri Steamship Co. (1889) 42 Ch.D. 321. English law was the proper law, illegality by the lex loci contractus was irrelevant.

Rule four, considered "doubtful"⁷⁷ ignores the proper law. The question here is whether the contract is invalid in so far as performance of it is unlawful by the law of the country where it is to be performed (irrespective of the proper law, by which the contract may or may not be valid.)

It must be noted at the outset that there are no cases where illegality exists by the *lex loci solutionis*, and where the forum is England and the proper law is that of a third country. In all the English and New Zealand decisions either the proper law was English law and therefore the court may be seen as applying domestic law and not private international law as such or the *lex loci solutionis* is also the forum or the contract is illegal by the proper law anyway. Thus there is no decisive authority, only dicta.⁷⁸

Cheshire & North⁷⁹ give the example⁸⁰ of two Germans

⁷⁷Cheshire & North at p.227.

⁷⁸See Morris at p.289 and R. v. International Trustee for the Protection of Bondholders Akt [1937] A.C. 500 at p.519 and Kahler v Midland Bank Ltd. [1950] A.C. 24 at p.41. and Zivnostenska Banka v. Frankman [1950] A.C. 57 at p.58. Two New Zealand decisions are Steinman v. De Courte (1899) 17 N.Z.L.R. 805 and Klatzer v. Caselberg & Co. (1909) 28 N.Z.L.R. 994. In the former it was not apparent what the proper law was and in the latter illegality resulting from New Zealand legislation rendered the contract unenforceable. See also F.A. Mann. Nazi Spoilation in Czechoslovakia (1950) 13 M.L.R. 206.

⁷⁹Cheshire & North at p.228.

⁸⁰These are the facts of Ralli Bros. v. Compania Naviera Sota of Aznar [1920] 2 K.B. 287 differing in the important respect that English not German law was the proper law. This case is often cited as authority for this proposition but loses force obviously by the fact that the proper law was English, making the case explicable on other grounds.

making a contract in Germany to carry jute on a German ship from Calcutta to Barcelona at a freight fixed in marks and payable in Barcelona. When payment falls due Spanish regulations are passed holding that freight on jute shall not exceed a sum which is a lot lower than the contract rate. German law is the proper law if the action is brought in England. Mann⁸¹ notes German law would probably hold that in view of the supervening Spanish legislation the place of payment would no longer be Barcelona.

Cheshire & North make the point that if a court decided to hold that illegality by the *lex loci solutionis* resulted in the contract not being enforced then this could result in an unjustifiable disregard of the proper law if the contract is governed by a foreign legal system (and is not the *lex loci solutionis*). They therefore conclude that the proper law should govern. Again if the proper law was omnipotent and a panacea for all choice of law difficulties they would be able to cite that the proper law did determine the matter. It would have been settled by case law.

Finally rule 5 states that

⁸¹F.A. Mann. Proper Law and Illegality in private International Law (1931) 18 B.Y.B.I.L. 97 at p.111.

"A contract is not unenforceable in England merely because performance is illegal by the law of the country in which a contractual debt is situated or in which the promisor carries on his business, or to which he belongs by nationality or domicile, provided that the contract is not subject in other respects to the law of that country."

Thus, in Rossano's⁸² case it will be recalled the proper law was held to be the law of Ontario. By the time the three endowment policies had matured Egyptian legislation had intervened making payment to Rossano without the consent of the Egyptian Exchange control authorities illegal. The court held that as Ontario law governed the discharge of the contracts and contained no provision stopping payment to Rossano, the company could not insist on paying him in Egypt. Thus Egyptian law did not have any application.

From these five rules it may be concluded that

- 1) The proper law is not omnipotent in the field of illegality.
- 2) lack of decided cases suggests that the proper law is not a useful concept.
- 3) The law on illegality is too difficult. Not only does the judge have to ascertain the proper law initially, a by no means easy task, he has also to consider these various rules.

⁸²Rossano v. Manufacturers' Life Insurance Co. [1963] 2 Q.B. 352 discussed supra at p.61.

A further criticism in this area is that the law as stated by the text books is simply too difficult. A judge not only has to work his way through the third rule of the proper law (if no choice of law has been made by the parties) he also has to establish if the facts are illegal according to the *lex loci contractus* or consider distinctive public policy depending on the applicable rule.

A far more simple and direct arrangement and one leading to certainty in commercial transactions would be to have one rule to cover all contract situations. Special rules are not necessary for the subject of illegality. Party autonomy should prevail subject to some overriding public policy exception, and if the parties have not made an express choice of law provision in their contract then the *lex fori* should determine the issue. This simple solution should be adopted.

The cases and rules discussed above can all be adequately resolved by applying the chosen law if there is one. Depending on the facts the illegality wherever it occurs can be upheld or not pursuant to forum public policy. If no choice of law clause exists then the forum with its laws and its public policy can produce the same results as are at present achieved but by a simple route.

Capacity⁸³

Even Cheshire & North admit that the question what law governs the capacity of parties to a contract is 'a matter of speculation'.⁸⁴ Dicey & Morris Rule 147⁸⁵ states that

"An individual's capacity to enter into a contract is governed by the system of law with which the contract is most closely connected or by the law of his domicile and residence.

- (1) If he has capacity to contract by the system of law with which the contract is most closely connected, the contract will (semble) be valid so far as capacity is concerned.
- (2) If he has capacity to contract by the law of his domicile and residence the contract will (semble) be valid so far as capacity is concerned.

A person's capacity to contract can be looked at as an emanation of his status and is therefore governed by the law of the domicile or it can be considered as a factor determining the validity of a contract and is therefore governed by its proper law.⁸⁶ Morris⁸⁷ says that there is general agreement amongst writers that in this context the proper law must be objectively ascertained as any other view would lead to the unacceptable result that a minor could

⁸³See Cheshire & North at p.221 et seq., Morris at p.285 et seq., Dicey & Morris at p.778 et seq., and see Dicey & Morris at pp.550-1 for capacity with regards foreign immovables e.g. to enter a contract to sell or mortgage them. H. Fischer. The Law Governing Capacity with Regard to Bills of Exchange. (1951) 14 M.L.R. 114.

⁸⁴Cheshire & North at p.221.

⁸⁵Dicey & Morris at p.778. Rule 147 does not apply to corporations (see Rule 139) and Fischer op. cit. supra note 83 at p.157.

⁸⁶Morris at p.285. Dicey & Morris at p.778.

⁸⁷Morris, *ibid*.

confer capacity on himself by agreeing that some more favourable system than the objectively ascertained proper law should govern the contract.⁸⁸

In the past capacity was formulated in terms of the *lex loci contractus* and the law of the domicile.⁸⁹ Early on two distinct schools could be distinguished, a leading proponent of the latter view being Savigny whilst Story considered that "every person contracting in a country is understood to submit himself to the law of the place and silently to assent to its action upon his contract."⁹⁰

The *lex loci contractus* is frequently fortuitous and

"It can hardly be argued that if a person buys goods in England under an English contract, French law should determine his capacity merely on the ground that he happens to be on holiday in France when he posts the letter of acceptance."⁹¹

Also

"In times of easy and rapid transport and great mobility of persons it would often lead to incon-

⁸⁸See the New Zealand examples and conclusion given by Webb at pp.12-13.

⁸⁹See Dicey & Morris at p.779 and cases cited in footnote 98. J.A. Clarence Smith. *Capacity in the Conflict of Laws: A Comparative Study*. (1952) 1 I.C.L.Q. 446 at p.452 makes the point that in all the early cases it was not necessary to make a decision between the two. He argues that the law of the domicile was preferable to the *lex loci contractus* as "any place (of contracting) must be casual unless it is the actor's home", although for mercantile incapacity rather than personal incapacity he suggests that the *lex loci contractus* may be relevant as it is the place of business.

⁹⁰J.Story. *Commentaries on the Conflict of Laws*. (1883) (8th edit.) at p.348. Cases exist supporting both views. See e.g. Webb footnotes 4 and 5 at pp.10-11.

⁹¹An example given by Dicey & Morris at p.779.

venience and to injustice if the validity of an ordinary contract made in one country was allowed to depend on the law of the foreign domicile of one party with which the other party could not be expected to be familiar."⁹²

"Thus it would be 'incompatible with justice and with the trust that lies at the basis of mercantile dealings, for instance, that a person over eighteen years of age should be able to escape from liability for the price of goods sold and delivered to him in a London shop on the ground that he is still a minor by his *lex domicilii*.'"⁹³

Thus all leading texts all support application of the putative law objectively determined. By refusing to permit the parties' choice to govern issues of capacity, English law avoids the need to consider this issue in terms of public policy. If questions of capacity are regulated by the legal system most closely related to the contract, it would be unreasonable for English ideas on capacity to override the rules of that system merely because England is the forum.⁹⁴

Bodley Head, Ltd. v. Flegon⁹⁵ provides an illustration and support for the use of the putative proper law. The facts of the case were that Alexander Solzhenitsyn, the Russian author, had granted a power of attorney to a Swiss lawyer to deal with his literary works outside Russia. This power stated that Swiss law was applicable in any disputes

⁹²Ibid at p.780. Morris at p.286-7 gives four hypothetical examples which illustrate the difficulty of deciding between the law of domicile and the proper law of the contract.

⁹³Morris' first example in the words of Cheshire & North at p.221.

⁹⁴This may be compared to the Restatement (Second) Conflict of Laws. 1971. See *infra* at p.203 et seq.

⁹⁵[1972] 1 W.L.R. 680.

between them. The Swiss lawyer assigned certain publication rights to a German publishing house who, in turn, authorised the plaintiffs to publish Solzhenitsyn's works in the United Kingdom. The defendant disputed the plaintiff's rights and argued that the agreement between Solzhenitsyn and the Swiss attorney was invalid as the former had no capacity under Russian law (which was both the *lex domicilii* and the *lex loci contractus*) to enter a contract to appoint an agent to contract abroad on his behalf.

Brightman J. whilst doubting the correctness of the allegation that Solzhenitsyn had no capacity under Russian law held that the question of capacity was to be decided by the proper law of the contract which was the law of Switzerland.

Other cases cited by the textbooks concern marriage cases and obviously cases involving a party's capacity to contract a marriage cannot be likened to ordinary commercial or mercantile dealings.⁹⁶ Thus Morris' final paragraph would seem to be a suitable summary of the present law. He said

".... the law which an English Court would apply to the question is obviously anyone's guess. The best solution, it is suggested, is to say that if a person has capacity either by the proper law of the contract or by the law of his domicile and residence, then the contract is valid, so far as capacity is concerned."⁹⁷

⁹⁶See Dicey & Morris at p.739 for Capacity of Corporations. Rule 139 does not utilise the proper law concept.

⁹⁷Morris at p.288.

Conclusion

The role played by the proper law concept in the area of capacity is not omnipotent. Dicey & Morris rule 147⁹⁸ does not even use the term "proper law". Domicile and residence can determine capacity and although reference is made to the system of law with which the contract is most closely connected, (a proper law Rule 3 situation) it is only afforded equal dominance with the concepts of domicile and residence.

As with illegality there are few cases, (indeed hardly any commercial contract cases are reported) thus the tendency by text book writers is towards considering what should be the law rather than stating what the law is. All the leading text books consider it an area of speculation. Once again if the proper law was an important useful concept surely there would be no need to resort to other legal devices such as domicile and residence to resolve questions of capacity.

The first rule of the proper law allowed for party autonomy subject to Lord Wright's qualifications that the choice be bona fide and legal and not contrary to public policy.⁹⁹ The law relating to capacity appears to be far removed from this basic rule. If the proper law doctrine is the great achievement of English conflict laws it would be used in the areas discussed so far rather than

⁹⁸Dicey & Morris Rule 147 at p.778.

⁹⁹Vita Foods Products Inc. v. Unus Shipping Co. Ltd.
[1939] A.C. 277 at p.290.

enjoying a status often not even equal to that of other conflict of laws concepts.

Again no special rules are needed for the issue of Capacity. Party autonomy should prevail subject to the application of 'overriding' statutes in force in the forum.¹⁰⁰ In New Zealand party autonomy should prevail subject to the judge deciding that as a matter of policy the Minors Contract Act 1969 is an overriding statute of the New Zealand forum.

If no governing law clause is present then the *lex fori* should apply rather than any putative proper law or other legal concept.

Morris¹ gives four fact situations involving capacity and resolves the first by applying the putative proper law. He has to resort to the reintroduction of *renvoi*² to solve another situation and employs interest analysis to decide the other two examples by analysing the facts into a false conflict situation. In the first three situations the *lex fori*³ achieves the results that Morris considers appropriate yet avoids the difficulties of the putative proper law and *renvoi*.

The fourth situation is the most interesting and because the *lex fori* produces a result different from

¹⁰⁰An 'overriding' statute is one which applies no matter what law the parties choose. Discussed in detail *infra* at p.311 et seq.

¹Morris at pp.286-7.

²It is generally stated that *renvoi* has no place in the law of contract. Morris at p.270 and see *infra* at p.358.

³It is assumed that in all examples the forum is England. Morris implies this.

that of Morris it may be considered in detail.

A 17 year old Arcadian at school in England enters into a contract in England with an English bank to obtain an overdraft. By Arcadian law the contract is valid; by English law it would be void.⁴ Morris argues that there is no real problem. The Arcadian is not entitled to the protection of Arcadian law, because by that law he is of full age, nor of English law, because he is not English. Morris then attempts to justify the non application of the English protective legislation to the Arcadian.⁵ "The desirable result" therefore Morris concludes is that the contract should be valid.

If the *lex fori* applies the contract is void obviously. The Arcadian schoolboy is protected by the law of the country in which he is staying and in which he acted. The bank is subject to its own law, there is nothing unfair about this; (indeed Morris' result produces a windfall for the bank in so far as the customer was Arcadian and not English).

The *lex fori* should therefore have been applied. One is tempted to conclude that Morris' argument supports the

⁴Morris at p.287.

⁵"When Parliament reduced the age of majority from 21 to 18 in order to implement the recommendations of the Latey Committee, it did so with English people and no others in mind; for all the evidence and statistics assembled by the Latey Committee were English evidence and English statistics." Morris, *ibid.* Footnotes omitted.

view that the Arcadian schoolboy is an unworthy foreigner
who is not to be afforded the advantages of British justice!

Formal Validity of a Contract

Formal validity is another area that may be cited to illustrate the use of other concepts besides that of the proper law. The formal validity of a contract concerns such matters as whether it must be in writing, under seal, signed under certain conditions and so on.

Webb⁶ gives three reasons for requiring the adoption of some particular form.

"The first is that there shall be evidence that the transaction was concluded. The second is the laudable aim of ensuring that the parties to a contract enter into it after due consideration and with full knowledge. The third is that the public interest is served in prompting confidence in validly concluded transactions and providing a simple and external test of enforceability."

Dicey & Morris⁷ state

"Rule 148 - the formal validity of a contract is governed by the law of the country where the contract is made (*lex loci contractus*) or by the proper law of the contract.

(1) Any contract is formally valid which is made in accordance with any form recognised by the law of the country where the contract is made (which form is called the local form), whether or not it is made in accordance with the form prescribed by the proper law of the contract.

(2) Any contract is formally valid which is made in accordance with any form required, or allowed, by the proper law of the contract, even though not made in accordance with the local form."

⁶Webb at p.47.

⁷Dicey & Morris at p.784 and see Cheshire & North at pp.219-21; Morris at pp.284-5.

Dicey & Morris also discuss the historical reasons supporting the maxim *locus regit actum*. They point out that since the middle ages it had been clearly recognised that it was enough to comply with the formalities required by the *lex loci contractus*. This principle generally referred to as the rule *locus regit actum* could thus be justified on the grounds of tradition and authority, justice and convenience. However the *lex loci contractus* could be fortuitous and whilst dicta in cases between 1797 and 1850 suggested that "a contract must be available by the law of the place where it was entered into or it is void all the world over" none of these cases involved mercantile contracts.⁸

Morris⁹ states that there is little modern authority on which law governs the formal validity of a contract. This is probably because most formal requirements in most legal systems are now at a minimum, and secondly because those which do exist are generally regarded by English courts as procedural.

Morris and Cheshire & North¹⁰ like Dicey & Morris say that it is sufficient to comply with the *lex loci contractus*, the justification being that parties must be able to rely

⁸Dicey & Morris at p.786, especially footnote 41.

⁹Morris at p.284.

¹⁰Cheshire & North at p.220.

on local legal advice when entering into their contracts.¹¹ Morris suggests that it is also sufficient to comply with the formalities prescribed by the proper law. This is "in accordance with reason"¹² for why, he says, should two Englishmen be compelled to resort to the Swiss Notarial form if they happen to be temporarily in Switzerland when contracting for the sale of land situated in England.

Prebble¹³ makes the point that if parties have gone to the trouble to adopt a choice of law clause they will probably ensure that the contract complies with the formalities of that chosen law. Webb¹⁴ considers two "sensible decisions" to illustrate the law here. In the first case¹⁵ a contract formally valid by the *lex loci contractus* (English law) was not by the proper law (French law) as insufficient copies have been made. It was held that the contract was valid because English law had been complied with.

In the case of Van Grutten v. Digby¹⁶ (which Cheshire & North¹⁷ cite as supporting the view that the proper law is an alternative to the *lex loci contractus*) the facts concerned a marriage settlement. The contract was governed by English law and the formalities were satisfied by

¹¹One may argue that this is equally so in other cases as well.

¹²Morris at p.285.

¹³Prebble at p.680.

¹⁴Webb at p.45.

¹⁵Guepratte v. Young (1851) 4 De G. & Sm 217.

¹⁶(1862) 31 Beav. 561.

¹⁷Cheshire & North at p.220.

English but not French law; the court held that since the contract complied with English legal formalities, it was formally valid.

Some formal requirements are characterised as procedural and are thus governed by the *lex fori*. Formal requirements have been revived in modern legislation which protect the weaker party to a contract - legislation on consumer credit being an obvious example.¹⁸ If such legislation forms part of the *lex fori*, it is likely to be applied irrespective of the proper law of the contract if the act for which formalities are required was done within the jurisdiction of the court. The English courts have a tendency to characterise as matters of procedure many issues which the Continent characterises as matters of form.

The Statute of Frauds is a notable example of a statute characterising various matters as procedural. In Leroux v. Brown¹⁹ for example the then Statute of Frauds held that any contract not to be performed for one year had to be in writing if it was to be enforceable in court. French law, which was the proper law had no such requirement. Leroux sued Brown in England for breach of their contract for supply of eggs and poultry by Leroux in Calais to Brown in England and failed as the procedural rule prevented en-

¹⁸Dicey & Morris at pp.786-7 also point out for example that formal validity is important when considering certain types of contracts such as contracts involving the transfer of property.

¹⁹(1852) 12 C.B. 801.

forcement in England.²⁰

Conclusion

Formal validity is not decided by exclusive reference to the proper law doctrine. At best it has been on an equal footing with the *lex loci contractus* as a tool for determining the formal validity of a contract. As with the other topics so far discussed there appears to be a dearth of modern case law pertinent to this area of law.

If a conflict exists whereby the contract is formally valid by the *lex loci contractus* and not by the proper law the cases²¹ show that the latter doctrine does not always prevail.

The role of the proper law is further whittled away by the practice of characterising certain matters as procedural as noted above. If a matter is procedural it is a matter for the *lex fori* and not a question to be determined by any other law.²² Characterising a matter as procedural rather than substantive is an example of an "escape device;"²³

²⁰Dicey & Morris at p.788 also note the problem of stamp laws here. If a foreign stamp law makes an unstamped document inadmissible as evidence in a foreign court it can nevertheless be used in an English court. See Bristow v. Sequeville (1850) 5 Exch. 275; but if the foreign law makes the document null and void for want of the stamp the reverse applies. See Alvez v. Hodgson (1797) 7 T.R. 241.

²¹Supra at p.107.

²²Morris at p.483.

²³See J.R. Lowe. Choice of Law Clauses in International Contracts: A Practical Approach. 12 Harv. Int'l Law J. 1 at p.19 et seq. (1971).

whereby the court 'escapes' for doing something it would otherwise have had to do. These escape devices provide a limitation on the effect of the proper law doctrine.

There are a variety of ways to escape having to apply choice of law clauses, characterisation being merely one example. One can for example interpret a choice of law clause, especially an unclear choice, in such a way as to avoid its application. In one case it was held that the word "covered" by German law did not mean that the case was "governed" by German law and therefore the New York forum applied New York law.²⁴ Probably the most common escape device is to hold that while the foreign law is to govern, it has not been adequately proved, so that the presumption is that the foreign law is the same as the forum's law and hence the forum's law is applied.²⁵ Public policy may also be evoked as an escape device to avoid the application of otherwise applicable law.²⁶ All these devices limit and undermine the effect of party autonomy on both sides of the Atlantic. However to return to the subject of formal validity, the conclusion must again be that the proper law is limited by other concepts and moreover the escape device of characterisation further reduces its importance and use.

²⁴Goodman v. Deutsch-Atlantische Telegraphen Gesellschaft 2 N.Y.S. 2d 80 (S. Ct. Kings Co. 1938).

²⁵ Lowe op. cit. supra n.23 at p.19 cites Gaines v. Jacobsen 124 N.E. 2d. 290 (1954). Morris at p.41 suggests it is preferable to abandon the terminology of presumptions and to simply say that where foreign law is not proved, the courts apply English law. See Lloyd v. Guibert (1865) L.R. 1.Q.B. 115 at p.129 for English authority.

²⁶See generally Morris at p.42 et seq. and supra at p.327 et seq.

Construction and Interpretation

"The task of construing the contract as a whole against the commercial background was not made easy by the combination of a mediaeval English form with a translation from modern Swedish."²⁷

The construction and interpretation of a contract is obviously a matter of considerable importance and potential difficulty.²⁸ This is the only area of law considered under the formation or creation of the obligation which has not as yet been discussed.

Once again the major text book writers tend to attribute an importance to the proper law doctrine which is unfounded. In Rule 150²⁹ Dicey & Morris hold that the proper law determines these issues. This may be illustrated by reference to the Bonython decision mentioned above when the third rule of the proper law was discussed.

Bonython v. Commonwealth of Australia³⁰ was a decision of the Privy council. The court was concerned with the meaning of the word 'pound'. In the last decade of the

²⁷Schiffshypothekenbank zu Luebeck A.G. v. Compton (The Alexion Hope). The Times 3 January 1988 per Lloyd L.J.

²⁸Dicey & Morris give the example of the words "to ship" which to English and New Zealand courts means "to place on board" whilst in America it often means "to load on a train." See Dicey & Morris at pp.294-5.

²⁹Dicey & Morris at p.808 and see Cheshire & North at p.239 et seq. and Morris at pp.294-5.

³⁰[1951] A.C. 201 and see F.A. Mann. On the Meaning of the 'Pound' in Contracts. (1952). 68 L.Q.R. 195.

last century, the Queensland Government issued certain debentures to secure a loan of two million pounds; the money was raised in England and Australia. Debenture holders were entitled to repayment in 1945 in Sterling in either London, Sydney, Melbourne or Brisbane, at their option. At the beginning of 1930 Australia devalued her pound relative to the English pound whereby one Australian pound equalled sixteen English shillings and correspondingly one English pound equalled twenty-five Australian shillings. One debenture holder chose to be paid in London and claimed to be paid face value of his stock in English pounds. It was held that the substance of the obligation must be determined by the proper law and Queensland law was the system of law with which this contract had its closest and most real connection. The debentures had been issued under a Queensland statute and was secured on Queensland public revenues. Whilst part of the loan had been raised in England it had been presumed that the Queensland Government was referring to the terms of its own monetary system as the money of account throughout and not to that of England. Thus a holder of a thousand ^{pounds of} stock desiring payment in London would receive 1000 Australian pounds (or if he wanted English money, 800 English pounds.) In other words as Queensland law was the proper law that law interpreted the word 'pound'.

The principle that a contract must be construed in accordance with its proper law is however subject to an important exception in the case of foreign money obligations.³¹

³¹Dicey & Morris at p.810.

"As soon as a contract refers to a currency other than that of the proper law, it is for the *lex monetae* and not for the proper law to define what are and what are not units of that currency."³²

Thus in Bonython's³³ case had the contract referred to pounds sterling English law would have determined how many Australian pounds would make an English pound.³⁴

Thus again the proper law concept is limited by exceptions.

Remaining Topics

Four contractual topics considered by the textbooks remain; there are Privity, Performance, Remedies and Discharge.

Privity was briefly considered in the pages that emphasised the lack of judicial decisions; thus three areas remain. Again rather than state the law in detail³⁵ it is the exceptions to the proper law of doctrine that are the present concern.

Whilst the proper law is applied to the rights and obligations of the parties³⁶ the "method and manner" of performance is regulated by the law of the place in which

³²Ibid at p.811. However it is for the proper law to determine the effects of revaluations etc. See Dicey & Morris at p.811.

³³[1951] A.C. 201.

³⁴For other currency cases, especially those involving New Zealand see B.D. Inglis. *Conflict of Laws*. (1959) at p.425 et seq.

³⁵See generally for the law here Dicey & Morris at p.812 et seq. Morris at p.291 et seq.

³⁶E.g. see Rule 151. Dicey & Morris at p.812.

it occurs rather than the proper law. This can be seen as the only practical possibility when one considers the examples Dicey & Morris cite after this proposition.

Thus in Mount Albert Borough Council v. Australasian etc. Assurance Society Ltd.³⁷ a New Zealand local authority borrowed money from a Victorian insurance company pursuant to a contract governed by the law of New Zealand. Rates of interest, a matter pertaining to the substance of the obligation would be determined by the proper law, i.e. New Zealand. However, a question such as whether such payments could be made by cheque or must be made by cash is a matter for Victorian law, being a question concerning the mode of payment.³⁸

Dicey & Morris suggest that it is possible to explain the application of the *lex loci solutionis* to the mode of performance on the grounds that the parties must be deemed to have intended to incorporate into their contract those parts of that law which refer to the manner in which the contractual obligations are to be discharged. From a practical point of view any other alternative would not make for good international relations. As an exception to party autonomy it is of limited significance. It can be likened to the rule that procedure is always a matter for the *lex fori*. This exception does not detract from party autonomy in any way.

³⁷[1938] A.C. 224.

³⁸See Dicey & Morris at p.814.

The above discussion would suggest that whenever the law of the place of performance and the proper law of the contract do not coincide a problem of classification could present itself. Either the issue must be seen as affecting the obligation itself and thus determined by the proper law or it could be classified as a matter of detail concerning the mode, place and time of performance and thus determined by the *lex loci solutionis*.³⁹ Again the proper law is not completely omnipotent.

Discharge⁴⁰ of a contract is "normally"⁴¹ determined by the proper law doctrine. Remedies⁴² likewise are governed by the proper law with certain areas, once again, being determined by another law. For example quantification or the measure of damages is a matter for the *lex fori* while questions of remoteness are determined by the proper law.

³⁹The difficulty in this distinction may be illustrated by reference to gold clauses and the determination of the currency in which a monetary obligation is expressed or to be discharged. Dicey & Morris at pp.814-5 give an example: "If X borrows \$1,000 from A under a contract governed by the law of New York, and the contract provides for repayment in London, English law will decide whether X must or may pay the debt in dollar bills or pound notes (money of payment) but the law of New York will determine whether "dollars" means United States or e.g. Canadian dollars (money of account)."

Thus in Bonython's case it was for the proper law namely Queensland law to determine the substance of the obligation; although England was a possible place of performance it could not define the term 'pound'.

⁴⁰See generally on the law here, Dicey & Morris at p.818 et seq. Cheshire & North at p.241 et seq., Morris at p.295 et seq.

⁴¹Dicey & Morris Rule 152 at p.818.

⁴²See generally Dicey & Morris at p.1177, Morris at p.295 et seq. Cheshire & North at p.240 et seq.

Conclusion

The inescapable conclusion, having considered the various topics of contract law, is that the proper law doctrine does not enjoy paramount control as the textbooks would indicated in their respective chapters on the proper law doctrine. There are very few areas where the concept is thought to apply without reference to other conflict of laws concepts such as domicile, or other theories such as the *lex loci contractus* or *lex loci solutionis*.

The absence of a coherent or comprehensive body of case law in these areas suggests that defects exist in the proper law doctrine which make it difficult to apply.

The rules of the proper law were developed as flexible and reasonable rules to resolve the choice of law issue. However they have not worked in practice, they have not been used exclusively to determine contractual issues which would have been the case had the rules provided a workable solution. The reasons why the rules (especially rules two and three) are not satisfactory are next discussed. Rule three is criticised first followed by criticisms of rule two. A discussion of the criticisms that have been levelled at party autonomy concludes this chapter.

RULE 3 CRITICISED

"At one time I thought that the factors pointing in each direction were very evenly balanced. So much so that I wondered whether it was permissible in affairs of this kind to declare a dead heat."⁴³

It is considered that the present Rule 3 of the Proper Law is unsatisfactory for the following reasons:

The Rule is too difficult to apply in actual cases

It is suggested that this is the result of the following matters:

i) Lack of Guidelines

No guides are provided by Rule 3 for the judge to decide which law is most closely connected with the contract.

Until recently the court made use of certain presumptions in order to establish the proper law of a given contract. Arbitration clauses are the obvious example.⁴⁴ If the parties chose to arbitrate in England then it was presumed that English law applied. This made for ease of application and certainty. It saved the courts time, and the litigants money. Today however an arbitration clause is merely a pointer to be considered with all other contacts. Rule 3 gives no guides as to what contacts are important in the setting of the particular contract.

It will be recalled that the aim is to find the system

⁴³Atlantic Underwriting Agencies Ltd & David Gule (Underwriting) Ltd. v. Compagnia Di Assicurazione Di Milano S.P.A. [1979] 2 Lloyds Law Rep. 240 at p.245 per Lloyd J.

⁴⁴Supra at p.49.

of law⁴⁵ most closely connected to the contract. Judges left without any guides may be forgiven for over-emphasising the geographical contacts. Assuming that the 'country' and 'system of law' most closely connected must both be considered together there is not even any indication whether geographic contacts are to be afforded the same weight as legal contacts.

ii) Multiplicity of Potential Contacts

The lack of guidelines for the judge becomes more acute when the number of potential contacts are considered. Even if the judge limits his choice of contacts to the actual contractual situation itself the multitude of potential contacts is staggering.

iii) Weight to be afforded to contacts difficult to establish

The weight to be afforded to each contact also provides problems. The cases which are discussed below illustrate the fact that contacts are not just to be lumped together but evaluated according to the importance they have on the particular fact situation under consideration. This is a very difficult task for the judge.

iv) Lack of stated reasons for choice

The judge is not required to state why any given contact or contacts should appeal to him as more weighty than any other contact. Each case must start anew, and if the contacts are equally balanced the onerous task of making a

⁴⁵As suggested by Lord Reid in James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd. [1970] A.C. 583 at p.604. See supra at p.66.

decision is in each case time consuming and consequently expensive.

If each case must be decided anew no useful body of precedent will emerge as a result of Rule 3.⁴⁶ No two contracts can ever be identical if one takes all the potential contacts into account. Even in simple contracts the nationality of the parties, place of contracting, place of performance, format, language, etcetera can lead to innumerable permutations making each case useless as a precedent.

Illustrations of Difficulties

These four points may be illustrated by a trilogy of English decisions.

First, The Assunzione⁴⁷ illustrates the problems inherent in applying Rule 3. It will be recalled that the contract was for the carriage of wheat from Dunkirk to Venice on an Italian ship. The French buyers wanted the law of France to apply and the Italian sellers wanted Italian law to govern the contract.

Singleton L.J. listed a number of Italian contacts and stated that some of these contacts were important. No reasons are given as to why he should have felt this. The form and place of payment seemed to be particularly

⁴⁶On the relationships between precedent and choice of law generally see E.M. Maltz. The Concept of Precedent in Choice of Law Theory. 51 Missouri L.R. 191 (Winter 1986).

⁴⁷[1954] P.150. See also J.A. Clarence Smith. The Assunzione Revisited. (1969) 18 I.C.L.Q. 449.

important and this probably helped the judge in concluding that "the scale comes down in favour of the application of Italian law". However the facts can be seen as nicely balanced between France and Italy. It would not have been unreasonable to find a dead heat except of course that that would defeat the very object of the exercise. Why the place and manner of payment should be the decisive factor coupled with the fact that the ship was Italian and the destination was an Italian port is not stated. It must be considered arbitrary to take one circumstance and elevate its importance without giving one's reasons.

James Miller & Partners v. Whitworth Street Estates⁴⁸ also illustrates the difficulty in applying the third rule of the proper law. Lord Guest⁴⁹ considered that there were strong factors either way and 'on balance' decided not to differ from the majority. By the time Whitworth Street Estates reached the House of Lords presumptions were out of favour. Hence the court had really very little to assist it in determining the proper law. One could argue that their lordships have to resort to a somewhat mechanical counting of contacts to find the system of law to govern the contract. Lord Wilberforce who perhaps more than any of the other judges endeavours to evaluate his contacts does so in what may be considered, with respect, a somewhat arbitrary manner. He notes that the contract was in English

⁴⁸[1970] A.C. 583

⁴⁹Ibid at p.607.

form and that the architect was London based "but goes on to say that one must not put too much weight on this fact." Pointers the other way were, Lord Wilberforce said, two in number. First he saw it as significant that no express choice of law clause had been inserted but "more important" was the "very weighty fact" that the place of performance was Scotland. He does not say why but rather emphasises his view by repetition ".... a Scottish site, under Scottish regulations, and probably by Scottish workmen". The whole exercise seems somewhat hit and miss. Why not emphasise the English form and the English respondents with a London-based English architect. Negotiations took place in London, and the locus contractus was probably London.

This case also provides an illustration of geographic contacts pointing in one direction and legal contacts in another. As it is "law not geography"⁵⁰ that regulates the rights of parties, the close connection must be with the system of law. An inexperienced judge could easily over-emphasise the geographical contacts.

In Amin Rasheed⁵¹ Lord Wilberforce engaged in the "classic process"⁵² of weighing the factors to determine the governing law, and acknowledged the difficulties inherent in the process. As a recent House of Lords decision Lord

⁵⁰Prebble at p.667.

⁵¹Amin Rasheed Corp. v. Kuwait Insurance Co. [1984] A.C. 50.

⁵²Ibid at p.71.

Wilberforce's judgment deserves detailed attention. His initial statement is that the ingredients said to connect the policy with English law are irrelevant or lacking in weight. These "include" payment of premiums and the use of London brokers. He then lists the remaining significant factors:

1. The form of policy expressed in the English language and requiring interpretation according to English rules of practice.
2. The nationality of the parties; neither were English.
3. The use of English sterling as the money of account.
4. The issue of the policy in Kuwait.
5. Provision in claims to be paid in Kuwait.

To this point the only evaluation given by Lord Wilberforce is that he places little weight on points 4. and 5. above; but he does not say why he feels that these contacts deserve little weight.

6. Lack of choice of law clause. This Lord Wilberforce considered a "pointer" towards English law.
7. Two other clauses were considered. The London Street or Royal Exchange or London clause was held to be insignificant, whilst the Institute clause with express reference to English law provisions was seen as important.

With "no great confidence" Lord Wilberforce concluded English law was the proper law of the contract.

The cases illustrate that the third rule does not work in a satisfactory way to solve choice of law problems in situations where the parties have failed to decide the matter themselves. An alternative rule is therefore required. It is argued that the only possible solution is to resort to the *lex fori*.

Rule 3 is open to a number of further criticisms going beyond the problem of difficulty of application.

Possibility of Abuse

This rule in the hands of inexperienced judges could result in lip service being given to the proper law doctrine. By not giving one's reasons for assessing contacts as weighty or unimportant it would be possible, and indeed tempting, to choose contacts that advance a predetermined choice.

It must be very difficult in cases where the facts or contacts are nicely balanced not to make an arbitrary decision by picking a contact at random to emphasise. After all the judge is obliged to come to a choice himself, he cannot very well declare a dead heat.

Results can be arbitrary

Rule 3 provides arbitrary results. The object of Rule 3 was to provide a solution to the choice of law dilemma when the parties had failed for one reason or another to nominate a law to govern their transaction. Whether the test is framed in terms of what reasonable businessmen would do or in terms of the closest connection the application of the test as illustrated by the cases results in arbitrary decisions. French law could just as easily have been chosen in The Assunzione.⁵³

⁵³[1954] P.150.

When one has followed the progress through the various courts to the House of Lords in the decisions discussed above⁵⁴ one is left with the feeling at the end of the day that the actual law chosen could just as easily have been rejected in favour of the rival law or laws. This brings the argument back to the former conclusion that the rule is difficult to apply, and if the result is in fact going to be arbitrary then it seems a waste of everybody's time and effort to employ a rule that is supposed to produce the opposite result.

No Logical Basis for the rule

"It seems to be accepted as an axiom that the law to which the case has its closest connection is the law best suited to govern it. In my opinion this is far from self-evident."⁵⁵

There is no legal or logical necessity for having a rule which hopes to find the law most closely connected to the contract. The law most closely connected to a contract is not inherently better able to decide the rights and liabilities of the parties. Take two African farmers in the middle of Africa entering a contract for the sale and delivery of some purely African commodity. The law most closely connected would be of the relevant African state but that does not mean that that law is necessarily the most satisfactory law to settle the dispute.

⁵⁴E.g. James Miller & Partners v. Whitworth Street Estates (Manchester) Ltd. 1970 A.C. 583 and Amin Rasheed Corp. v. Kuwait Insurance [1984] A.C. 50.

⁵⁵S. Braekhus. Choice of Law Problems in International Shipping. (1979) 111 Recueil des Cours 255 at pp.274-5.

Alternatively it may be argued that in purely commercial contracts disputes are often rather prosaic, one brand of legal regulation of a case may be just as good as another and so long as one has a clear choice of law rule parties will accept the results as just. Thus there is little need to use the expensive and time consuming methods which weigh contacts and evaluate them. If contacts are nicely balanced it means that the alternative solutions from a practical point of view are equivalent, and that the choice between them should be made on the basis of far simpler and clearer criteria. Indeed the fact that England has so often been chosen as the forum in arbitration clauses (with or without an accompanying choice of law clause) indicates that although the contact might be geographically most closely connected to another country the parties considered English law best suited to govern their particular contract.

If there is no logical necessity for the rule the question becomes why have it? Obviously it was considered to be a rule that would produce the best result in the circumstances. Arbitrary rules are frequently criticised and Rule 3 was supposed, one presumes, to be a flexible tool. However it is difficult to apply and for this reason does it in fact result in arbitrary decisions being reached. It seems unfortunate to have a rule that is in practice difficult to apply and therefore time consuming for the judge and consequently costly in terms of time and expense if at the end of the day the result reached is going to be arbitrary anyway.

Conclusion (Rule 3)

It would of course be possible to alter Rule 3 to avoid some of its present disadvantages. Judges could be required to state why any given factor is weighty, legislation could be passed setting out important contacts and so on. However the rule is inherently defective in so far as it must always, by its very nature, be too difficult to apply. Change is needed.

Three points may be made at this stage.

First there must be a rule to cover situations where the parties have failed to exercise their choice. Ideally every international contract would contain a clear choice of law clause. This must be the goal. Parties should be made aware of the fact that a choice of law clause can save litigation if a dispute arises. Choice of law clauses should become the norm, one could even foresee a time where it would be considered careless, perhaps even negligent for a solicitor not to have advised his client on the necessity for such a course of action. However there are oral contracts which do not lend themselves so readily to choice of law consideration and there will always be parties who do not seek legal advice. People will always exist who sign contracts without reading them; contracts will contain meaningless choice of law clauses and there will inevitably be a group of litigants who through stupidity, negligence or intention find that someone else will have to make a choice of law decision for them.

So there is a need for a rule to cover situations where the parties have not made a choice.

Secondly it may be argued that given that the parties may choose a governing law clause, not to do so is to risk being viewed unsympathetically. Whatever law a court decides to apply in this situation should not be a cause of complaint by the litigants. They could have exercised their choice had they so desired. Thus for the parties to argue that an unexpected or arbitrary choice has been made by the court should be an argument doomed to failure. To argue this means however that party autonomy must not be hedged in with a multitude of exceptions; the parties must be able to exercise genuine free choice.

If parties have the opportunity to choose a governing law and then fail to exercise this option there is no reason why a court cannot choose a law it likes to determine the issue. To consider the parties' wishes at this stage merely pampers them and could tend to discourage the use of choice of law clauses.

Thirdly the rule chosen should be reasonably easy to apply. This will assist judges, decrease court costs, and make for certainty and predictability. It will become apparent after considering existing and proposed alternatives in other parts of the globe that the only possible law to apply is the *lex fori*. All that needs to be noted at this stage is that in the two House of Lords decisions discussed above English law was held to be the proper law and in The Assunzione the litigants finally chose English law anyway.⁵⁶ The *lex fori* has produced the same results via an easier, more logical road.

⁵⁶James Miller & Partners v. Whitworth Street Estates (Manchester) Ltd. [1970] A.C. 583; Amin Rasheed Corp v.

To Summarise

1. A rule is needed to cover situations whereby the parties have failed to choose a law to govern their contract.
2. Because the parties have failed to exercise their option to make a choice of law decision their wishes on the matter are no longer relevant.
3. The aim must be towards encouraging the use of choice of law clauses. The rule adopted must foster not discourage party autonomy.
4. The present Rule 3 is unsatisfactory. It is difficult to apply; the judge has no guides, the contacts involved are potentially too numerous, the weight to be afforded each contact difficult to establish. The present rule means each case must be considered anew, and the lack of a requirement specifying the reasons for emphasising different factors could lead to abuse.
5. There is no logical or legal necessity to frame the rule in its present terms.
6. The conclusion is that Rule 3 should be abolished and an alternative rule substituted. Rule 3 produces arbitrary results after much time and effort for all concerned. The new rule should avoid these defects. The lex fori should be applied to determine international contracts that do not contain a choice of law clause.

RULE 2 CRITICISEDRule is difficult to apply

As there are few words "less precise or more ambiguous than intention"⁵⁷ the major difficulty with Rule 2 is that it asks the judge to embark upon an enquiry that can again be simply too difficult.

The problems inherent in establishing party intention are obviously not unique to conflict of law situations. It has long been a problem in domestic contract law. The position for judges faced with an international contract has become increasingly difficult since the decline in use of presumptions. Today all factors are merely indicators to be considered in the light of all relevant circumstances.

The judge is asked to consider the parties' intention at a time when a dispute has already arisen. Obviously the stage has been reached where there is a conflict between the parties as to which law is to govern otherwise the issue would not usually have arisen.

By the time the matter is before the judge each side will have decided which law they would have liked to govern their contract using hindsight, and as Singleton L.J. pointed out in The Assunzione⁵⁸ it is little use in saying that neither party would ever have agreed to the other's choice

⁵⁷Cheshire & North at p.197.

⁵⁸[1954] P.150.

had they considered the matter because that would have resulted in no contract existing whereas one clearly did.⁵⁹

The need for a Rule 2 questioned

Surely it is not reasonable to ask a court to ascertain the parties' intentions if they had had the opportunity to make an express choice of law provision in their contract and had failed to do so.

If the parties do not expressly choose a law to govern their contract they can hardly complain if a choice is made for them (and Rule 3 is employed.) The court objectively determines the matter. It sees what a reasonable businessman would consider objectively to be the law with the closest connection. The parties are not thereby prejudiced. In commercial matters parties should be aware of choice of law clauses. If they act without legal advice then they should not be able to complain if they do not avail themselves of a legal advantage, namely a choice of law clause. Alternatively if parties seek legal advice when entering their contracts then if they are not advised to make an express choice the legal advisor may be said to be failing in his duty. In this event the parties will only make the mistake once of not providing for a governing law and as stated above the law will still assist the litigants to the extent

⁵⁹One wonders why Singleton L.J. mentioned the parties at all in this context. He was after all considering a Rule 3 situation, which is not a situation where the parties are consulted or considered.

that the judge applying the third rule will determine a governing law reasonable in the circumstances.

Conclusion

It has been suggested that logically, if an intention is discoverable, its treatment should not depend on whether or not it is explicit.⁶⁰ However American courts and theorists no longer search for the parties' intention as to choice of law unless it is explicit. This was not always the case as last century decisions illustrated⁶¹ however the American Restatement (Second)⁶² suggests that where the choice is not explicit very little weight should be given to it.

It may be suggested that if there is no express choice then it is logical for the courts to look for an implied choice and that if they cannot find one the judge can fall back on the third rule. However there is nothing illogical for a judge to go straight from rule one to rule three. Furthermore rule two, by its very existence, pampers the parties who should have made a choice for themselves explicitly; it can thus be seen as discouraging the use of choice of law clauses. Furthermore it is not necessary. It should be abandoned.

Only rules one and three are necessary if the proper

⁶⁰R.J. Bauerfeld. Effectiveness of Choice of Law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination. 82 Colum. L.Rev. 1659 at p.1661 (1982).

⁶¹E.g. Pritchard v. Norton 106 U.S. 124, at pp.136-7 (1882), Wayman v. Southard 23 U.S. (10 Wheat.) 1, at p.48 (1825).

⁶²Restatement (Second) Conflict of Laws. Section 187 comment (a) at p.561.

law is to be maintained. If a choice is made rule one governs and rule 3 covers all contracts where the parties failed to exercise their option of including a choice of law clause.

Subsequent Conduct: A Note

If Rule two did not exist the problem of subsequent conduct would not arise. The present English position is that subsequent conduct may not be considered when ascertaining the law to apply to an international contract.⁶³

The main reason for not allowing subsequent conduct to be considered is that such a rule makes for certainty⁶⁴ "otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later".⁶⁵

Another possible reason for not allowing subsequent conduct to be considered is the possibility that a party could be tempted to act in a certain way in the hope such conduct would be considered in preference to previous conduct

⁶³Amin Rasheed Corp. v. Kuwait Insurance Co. [1984] A.C. 50 at p.69. This does not apply if the parties have varied their contract, entered into a collateral contract or if questions of estoppel arise. Cheshire & North at p.210.

⁶⁴See F.A. Mann (Note). (1973) 89 L.Q.R. 464.

⁶⁵James Miller & Partners v. Whitworth Street Estate (Manchester) Ltd. v. A.C. 583 at p.603 per Lord Reid.

[1970]

which for some reason the party would preferred to have overridden by the subsequent conduct.

The advantage of allowing subsequent conduct is obvious. The judge needs all the help he can get and what parties subsequently say and do could be very relevant.⁶⁶ The cases do not make it clear if subsequent conduct applies to Rule 2 as well as Rule 3 situations. It should in any event not be relevant for Rule 3 situations as what the parties may or may not have done is irrelevant once it has been established that they have not made a choice of law decision. If Rule 2 was abolished then there would be no need to consider subsequent conduct at all for these rules.

The remaining matters to consider are perhaps not strictly criticisms of Rules 2 and 3 themselves as such but rather criticisms of the way in which they have been confused by judges and academics alike. One may however contend that this would not have occurred had the Rules themselves been less difficult to apply in the first instance.

The first matter concerns the lack of clarity over which rule is in fact being applied.

⁶⁶The present New Zealand Court of Appeal attitude to subsequent conduct in wholly domestic contracts may be seen in James Wallace Pty Ltd. v. William Cable Ltd. [1980] 2 N.Z.L.R. 187. and International Ore & Fertiliser Corporation v. East Coast Fertiliser Co. Ltd. [1987] 1 N.Z.L.R. 9 at p.18.

A Further Problem: Lack of Clarity over which rule is being applied in the actual case at bar

Whilst the fact situations of some cases⁶⁷ make it difficult to place the parties' actions into one of the three rules above there is nevertheless a tendency for judges to arrive at conclusions without specifying which Rule they consider applicable. Lord Hodson's judgment in Whitworth Street Estates⁶⁸ illustrates this point. His Lordship specifically states that the proper law is that with which the transaction has its closest and most real connection⁶⁹ and cites Bonython v. Commonwealth of Australia.⁷⁰ He then in the following paragraph said "The parties not having expressly chosen the proper law or stated their intention the court must act on the evidence before it and fix the presumed intentions of the parties as best it can."⁷¹

⁶⁷For example in Dimskal Shipping Co. S.A. v. The International Transport Workers Federation (The 'Evia Luck') [1986] 2 Lloyd's Law Rep. 165 a number of closely connected agreements were entered into but only one specified a governing law. Hirst J. at p.173 pointed out that he considered it difficult to think that the parties intended different proper laws to apply but if the third test was used English law would still apply as the most closely connected.

⁶⁸James Miller & Partners v. Whitworth Street Estates (Manchester) Ltd. [1970] A.C. 583.

⁶⁹Ibid at p.605.

⁷⁰[1951] A.C. 201

⁷¹[1970] A.C. 583 at p.606 emphasis added.

With respect to Lord Hodson he did not have to do this at all. If he thought it a Rule 3 situation he could objectively determine the law with the closest connection to the contract. This assumes of course that the correct approach for the third rule is objective as discussed above.⁷² Lord Hodson was not alone in this view. Lord Wilberforce also questioned "what intention ought to be imputed to the parties "⁷³ yet he appeared to be applying the third rule. By not explicitly stating which rule one is considering, it could be argued that confusions can arise. It seems very unlikely from the tenor of their Lordships' judgments that they were intending to alter the Bonython⁷⁴ test, indeed they cite it with approval, yet references to party intent if one is applying the Rule 3 Bonython test are misplaced. By the time Rule 3 is approached the court has given up the quest for the parties' intent and is applying an objective test.

The two rules are quite separate and distinct. It is therefore utterly confusing to state as Morris does that "there is inevitably some overlap between the second stage and the third."⁷⁵ If the Bonython⁷⁶ test is the correct test for Rule 3, and Morris and the cases would indicate it

⁷²See supra at p.58.

⁷³[1970] A.C. 583 at p.614.

⁷⁴Bonython v. Commonwealth of Australia [1951] A.C. 201.

⁷⁵Morris at p.270.

⁷⁶Bonython v. Commonwealth of Australia [1951] A.C. 201.

was, then there can be no overlap. Even if Morris was considering the wide range of possibilities within Rule 2 one is still within Rule 2 and is endeavouring to elicit the parties' intention. It is only when the parties have not made a choice that the objective third test is applied. This failure to articulate which rule is being applied becomes of greater significance when the consequence of the choice between the two rules is considered.

If one employs Rule 2 a different law may be applied by the court than if the court decides it is a Rule 3 situation. Again Whitworth Street Estates Ltd.⁷⁷ illustrates this point.

Lord Reid⁷⁸ considered that the contract used was in English form. What reason, he asked, could there be for adopting the English form other than an intention that the law of England should be the proper law of the contract? It would seem that thus far Lord Reid is suggesting that it is a Rule 2 situation and that he will be able to infer a choice of law. However he continues by saying that there could be a very good reason why an English architect should choose an English Royal Institute of British Architects (R.I.B.A.) form. The architect may well prefer that a contract should be in a form with which he is familiar because any form of building contract is exceedingly com-

⁷⁷[1971] A.C. 583.

⁷⁸Ibid at p.602 et seq.

plicated, and he continues by suggesting that all the parties may accede to this wish without giving a thought to the question of proper law. "Indeed, this is what seems to have happened in the present case". Lord Reid does however apply Rule 3 and comes to the conclusion that the law of Scotland is the proper law.

This may be contrasted to the judgment of Viscount Dilhorne.

Viscount Dilhorne clearly stated that if the case had reached the third rule or stage then "I would hold without hesitation that the Scottish system of law was the one..."⁷⁹ but he went on to say, "I do not, however, think that in this case one gets to that stage, for both parties intended that the contract should be governed by the law of England." He considered that the conduct of the parties at the time the contract was entered into showed that despite the fact that the work was to be done in Scotland meant that both parties intended English law to apply. He had earlier on in his judgment⁸⁰ noted that it could be expected that a contract to be carried out in Scotland by a Scottish company with Scottish labour would be governed by Scottish law.

In order to arrive at the conclusion he did, Viscount

⁷⁹Ibid at p.609.

⁸⁰Ibid at p.611.

Dilhorne first quoted the evidence of the builder's chief surveyor who had said that he had met the architect in London and expected "some sort of agreement", probably a R.I.B.A. contract. Viscount Dilhorne's second point accords with Lord Reid's view that the English architect would naturally choose a form of contract with which he was familiar, but adds "and one governed by English law." (There was no evidence of this.)

The Chief Surveyor agreed to the R.I.B.A. form and so, "in the circumstances of this case must be taken to have agreed that the contract in English form and with its language based on English law should be governed by the law of England."

Two completely different views which produce the important practical consequence that different laws are obtained depending on the Rule used.

A Practical Consequence of the English Rule

The Proper Law doctrine must be seen in its English conflict of laws setting. Cheshire & North⁸¹ have pointed out that the function of private international law is complete when the appropriate system of law is chosen and that its rules do not furnish a direct solution of the dispute.

"It has been said by a French writer that this department of law resembles the enquiry office of a railway station where a passenger may learn the platform at which his train starts."⁸²

The proper law locates the jurisdiction, this is its only object, it does not actually consider the final practical result. It is sometimes called a jurisdiction selection approach in contrast to the American result - orientation approach.⁸³ In England the actual content of the law is not considered when establishing the proper law.⁸⁴ This can produce some rather strange practical results.

The Assunzione⁸⁵ illustrates this point. Had the actual effect of applying Italian or French law been considered initially much time and effort and expense could have been saved. The parties clearly could not have considered the effect of either of the two laws, and the judge was not required to. Two court cases resulted and finally the judge applied the third rule and decided Italian law

⁸¹Cheshire & North at p.8.

⁸²Ibid.

⁸³The content of the relevant laws is considered in America. See infra at p.161.

⁸⁴Prebble at p.720 et seq.

⁸⁵[1954] P.150.

governed the contract. The amazing fact is that when the parties' case finally came to trial on the merits they had agreed that the English Carriage of Goods by Sea Act 1924 should apply!

Prebble⁸⁶ considers that the parties and their legal advisors must have been somewhat "hazy" about the effects of the relevant laws.

Since however the English approach does not provide a rule of decision, (but only identifies the country that is to provide it) the proper law doctrine tends to be negative in regard to criteria such as justice and fairness between the parties.

In selecting the proper law English courts do not compare the content of the relevant laws and apply the law which appears the most suitable in the circumstances. It has been suggested⁸⁷ that the reason for this is that to ask judges to compare the *lex fori* with other laws is an "invitation to parochialism." A strict neutrality is to be preserved between the possible applicable laws; by not considering their content this is said to result. It is also argued that courts would not manage the task of examining the end solutions of different systems of law and then choosing the one that seems to best meet the forum's

⁸⁶Prebble at p.452.

⁸⁷L.F.K. Baxter. International Business and Choice of Law. (1987) 36 I.C.L.Q. 92 at p.107.

criteria of fairness between the parties, one of whom at least will be a foreigner. In America the content of the laws are examined.⁸⁸

Whilst in theory it would appear an excellent plan to consider the content of each jurisdiction's law, the practical possibilities of actually doing so must be considered. Who is to find out the content of the various laws, who is to advise the judge, is the judge to decide which law is 'best' in the circumstances? Would certainty and predictability be sacrificed by such an approach? If the approach was used in Rule 3 situations why not in Rule 1 situations also. Party autonomy might have to be sacrificed. The various disadvantages must outweigh the advantages. However by abandoning the proper law and adopting party autonomy and the lex fori the practical consequences discussed above should, to a certain degree, be mitigated. If parties are encouraged to make choice of law decisions, in other words if party autonomy is to prevail, then the parties will consider the effects of their choice. Most reasonable parties are going to ask what effect the law to be chosen will have on their contract and thus cases such as The Assunzione⁸⁹ will be rare. They will be rare because choice of law clauses will be the norm. Party autonomy assumes in general that most parties will consider the effect of their choice.

⁸⁸See infra at p.161 et seq.

⁸⁹[1954] P.150.

CRITICISM OF THE PARTY AUTONOMY OR RULE 1 OF THE
PROPER LAW DOCTRINE

By way of completeness the criticisms of party autonomy may be considered at this point. There are eight in number.

1. Party Autonomy becomes a legislative act.
2. Party Autonomy cuts across other theories.
3. Party Autonomy may not effect party intention.
4. Party Autonomy is difficult to apply.
5. Party autonomy could lead to absurdity.
6. Party Autonomy is illogical.
7. Party Autonomy evades the application of the applicable law.
8. Party Autonomy is not required.

A Note on the Advantages of the Party autonomy concludes this heading.

1. Party Autonomy Becomes a legislative Act.

The primary theoretical objection to the autonomy rule in the 1930's was that it allowed the parties to a contract to do a legislative act. "So extraordinary a power in the hands of any two individuals is absolutely anomolous."⁹⁰

People cannot by agreement substitute the law of another place. An agreement is not a contract, except as the law says it shall be, and to try and make it one is to pull on one's bootstraps. "Some law must impose the

⁹⁰2 Beale. Conflict of Laws. (1935) at p.261.

obligation and the parties have nothing whatever to do with that; no more than with whether their acts are torts or crimes."⁹¹

The answer quite simply is that the parties are not legislators; the forum choice of law rule allows the parties to choose a law to govern their contract.⁹²

As Mann⁹³ points out, "No act of the parties can have any legal effect except as a result of the sanction given to it by a legal system." He notes that "this elementary and obvious fact is frequently overlooked."⁹⁴

There is nothing to prevent the forum from adopting a choice of law rule that holds that the governing law shall be that chosen by the parties. "When the forum adopts such a rule, the law chosen is applied not because the parties are legislators but simply because this is the result required by the choice of law rule of the forum."⁹⁵

⁹¹E. Gerli & Co. v. Cunard S.S. Co. 48 F.2d 115 at p.117 (2d Cir. 1931) per Hand J.

⁹²W.L.M. Reese. Contracts and the Restatement of Conflict of Laws, Second, (1960) 9 I.C.L.Q. 531 at p.534. Restatement (Second) Section 187 (2) comment. (e). M. Rheinsteins Book Review, 15 U.Chi.L.Rev. 478 at p.486 (1948).

⁹³F.A. Mann. Lex Facit Arbitrum in International Arbitration. Liber Amicorum for Martin Domke (1967) at p.161.

⁹⁴Ibid. Note 25 at p.179. Mann makes these observations in the context of arbitration but they have general applicability.

⁹⁵W.L.M. Reese. Power of the Parties to Choose Law Governing their Contract. 54 Proceedings - Am. Soc. of Int'l Law. 49 at p.51 (1960).

The party autonomy rule makes for certainty,⁹⁶ predictability and spares the court the "pain"⁹⁷ of deciding which law is to govern.

2. Party Autonomy cuts across other theories

Another argument is that the autonomy rule fails because it cuts across all of the other theories, carving out a special group of cases - "those in which the parties' intention concerning which law to apply is explicit - and decides them without reference to the general theories..."⁹⁸

Bauerfeld lists the general theories as government interest analysis, grouping of contacts, Weintraub's Presumption of Validity⁹⁹ and Ehrenzweig's Rule of Validation¹⁰⁰ none of which give complete control to choice of law clauses.

Against this one may argue that choice of law clauses must and will become the norm. Elsewhere Bauerfeld¹ argues that choice of law clauses do not provide the parties with

⁹⁶See infra at p.472 et seq.

⁹⁷Reese op. cit. supra n.95 at p.51.

⁹⁸Bauerfeld op. cit. supra n.60 on p.131 at p.1664 et seq.

⁹⁹See infra at p.402.

¹⁰⁰See infra at p.403.

¹Bauerfeld op. cit. supra n.60 on p.131 at p.1668 et seq.

any degree of certainty because the courts do not always uphold such clauses. This is not the fault of the principle; if the court upheld such clauses more and more persons would use such clauses.

In answer to Bauerfeld's argument one may say that the autonomy rule is and should be paramount, contracts containing governing law clauses are not a special group, rather they represent, or will come to represent, the majority of contract cases. The "general theories" could only possibly apply to the lesser group of contracts that do not contain a choice of law provision.

3. Party Autonomy may not effect party intention

Another criticism of party autonomy runs along the lines that party autonomy does not give effect to party intention because the parties could choose a law which resulted in their contract being invalid or because the court chose not to uphold it for whatever reason. Weintraub² argues that the 'true' intent of parties is not so much that a particular law govern but that the contract is binding. Except when parties err they will choose a validating law and thus the autonomy theory is really only a rule of validation, a choice of law clause only expresses the obvious - the parties wish their contract to be binding.

²R. Weintraub. Choice of Law in Contract. 54 Iowa L. Rev. 399 (1968).

They would wish this whether or not a choice of law clause is included.

It is possible to see the ultimate intention of each party as a matter of furthering self interest. Each party is entering into a bargain; each side endeavours to secure the most advantageous results possible. As both parties wish the best possible result for him or itself and each realise the other is wanting the same some compromise is therefore inevitable. Whilst it might be possible to argue that in many wholly domestic contracts parties could be entering contracts without being aware of the fact they are doing so and can therefore be seen as being unaware of the legal significance of their acts, this is less likely to be the case in a more sophisticated business setting involving more than one jurisdiction. In general the parties must be aware at this level that contracts are legally binding and each party agrees to be bound so long as it is to his advantage. If both parties always intend that the contract binds them and is to be fully effective then there would never be any court actions. The very fact of litigation means that one party does not want to be bound by the agreement he in fact made. He might think that it is legally effective but he can hardly be said to wish something to be effective which he is now trying to avoid. What each party really would like at heart is to secure the best bargain for himself and bend the other side to this bargain. If later it appears that it would be more advantageous not to continue with the arrangement then ideally he would like

not to be bound, but until such a situation comes into existence he compromises and becomes bound himself because that is the only way that he can bind the other party, (and obviously he will want to bind the other party until such time as it is advantageous to him to not be bound).

Whilst this would appear to be stating the obvious, it does illustrate the fact that party intention is not static, the parties' intention can change depending on non legal circumstances. Party autonomy does give effect to the parties' intention at some point in time. When the parties agree on the choice of law to govern their contract it may be said that that is the law which they intend to govern if a dispute arises. By the time the parties are in court, arguing over some matter whether it be the choice of law clause itself or some other issue their wishes and intentions differ. If the court upholds the governing law clause it is not only giving effect to what both parties originally intended but the court is also giving effect to the present intention of one of the parties. It is giving effect to the choice made by the party who has not changed his mind. It would seem that it is preferable for a court to uphold this party's choice; the court is giving effect to the original agreement. Unless some fundamental public policy consideration is pertinent or the consent was not genuine for some reason, it is surely preferable to have a rule which upholds the original agreement. To help parties who have changed their minds and who now do not want the governing law to apply encourage others to change their minds too; and if parties are not to be kept to

their agreements then the whole idea of having enforceable bargains, that one can rely on, is undermined.

Thus in answer to the criticism that party autonomy may not effect party intention it may be said that if courts always respected party autonomy the will of the parties would prevail at one stage, and the choice of one of them (the litigant seeking to rely on the choice of law clause) will continue to be upheld. Again the criticism relates more to the way the party autonomy rule is applied by the courts than to its inherent characteristics.

4. Party Autonomy is Difficult to Apply

Some writers³ see the autonomy rule as easy to state but difficult to apply in an actual decision because states or jurisdictions which adhere to the rule always include some fundamental policy exception to override an express choice in certain situations.

This however is not so much a criticism of the limits thereto. Obviously party autonomy should not be hedged in with a multiplicity of exceptions.⁴ It should be the basic rule, governing law clauses should only be defeated in rare cases.

³E.g. Bauerfeld op. cit. supra n.60 at p.178.

⁴The limits on party autonomy are discussed infra at p.310 et seq.

5. Party Autonomy could lead to absurdity

Morris⁵ states that the disadvantages of allowing the parties express selection of the proper law is that if capriciously exercised, it may subject the parties to a law which is unrealistic to the point of absurdity. This argument, which appeals to all objectivists, can be equally reversed, the argument being that given one's choice is bona fide and legal and not contrary to public policy then why not let Gamillscheg's German and Argentinian choose English law?⁶

This argument is of academic interest only as parties do not choose capriciously, "Situations of this sort do not arise in practice."⁷

6. Party Autonomy is illogical

Another criticism⁸ of the doctrine arose towards the end of the nineteenth century when jurists in France, Germany, Holland and Switzerland branded the judicial decisions as illogical; before it is possible to say, they reasoned, that an agreement between the parties determines the law governing the contract, it must first be ascertained what law is to be applied to determining the validity of the agreement itself.

⁵Morris at p.281 et seq.

⁶Gamillscheg's views are discussed supra at p.43.

⁷Restatement (Second) Conflict of Laws. (1971) Section 187 Comment (f) at p.567.

⁸See M. Wolff. Choice of Law for the Parties in International Contracts. (1937) 49 Juridical Review 110 and see

Again the arguments of Mann⁹ counter this criticism. It is the forum's law which allows the party's choice to apply.

7. Party Autonomy evades the application of the Applicable law

A further criticism of party autonomy is that it allows the parties to evade the applicable law by adopting any law they so wish.

Cheshire¹⁰ took this view. He gave an example of two Englishmen making a written contract in London by which A agreed to pay B five hundred pounds a year to B for five years. By English law this agreement is void for want of consideration. If it were a Scottish contract it would be valid.

Cheshire said it would be "puerile"¹¹ to suggest that the parties could make the contract valid by stating that consideration was not essential and to insert a Scottish choice of law clause cannot be a more effective means of conferring validity upon the English contract. "The parties have attempted indirectly instead of directly, to avoid the compulsory rule." Even if the contract is made in Edinburgh, thus giving it a faintly Scottish connection, this cannot alter its essentially English character.

A. Thomson op. cit. supra at n.11 on p.74 at p.650.

⁹Supra at p.143.

¹⁰Cheshire at p.20.

¹¹Ibid.

Cheshire concludes that a contract, so far as its valid creation is concerned, must in the nature of things be subject to the law of the country with which it has the most real connection.¹² Mann¹³ suggests that Cheshire's observations lose their force when it is realised that he (Cheshire) "is inevitably driven to the very conclusion which he condemns and in fact allows and must allow, the parties to do by a little more indirect route what, according to him they cannot do directly; he allows the parties to determine the localising elements on the basis of which the judge is supposed to ascertain the contract's centre of gravity." Mann goes on to say that in Cheshire's example above had the parties made Scotland the place most substantially connected with the contract (e.g. by using agents to conclude the contract in Scotland, by making provision for payment in Scotland, etc.) then the law of Scotland would apply. Such reasoning, says Mann¹⁴ "rewards the artful and penalises the innocent." Mann's reasoning destroys Cheshire's argument and disposes of this criticism of party autonomy.

Two further points may be made. First, the argument requires the existence of an applicable law in the first

¹²Ibid at p.21.

¹³F.A. Mann. The Proper Law of the Contract. (1950)
3 I.C.L.Q. 60 at p.63.

¹⁴Ibid.

instance.

The notion that a contract is governed by an a priori applicable law and that party autonomy, by allowing a different law to be chosen is an exception to this, is now out of favour.¹⁵ Rather it is argued that an international contract generally has a real connection with more than one jurisdiction and so there is no one applicable law anyway.

Secondly, it was held in Golden Acre Ltd. v. Queensland Estates Ltd.¹⁶ that the choice of Hong Kong law was not to be upheld because it evaded Queensland statute law. As Kelly¹⁷ noted the choice of law clause could have been upheld and the Queensland legislation still have applied. This is the better view, party autonomy prevails subject to the Queensland statute applying in a Queensland forum.¹⁸

8. Party Autonomy is not required

Finally and at a more general level Niboyet¹⁹ has

¹⁵M.J. Levin. Party Autonomy. Choice of Law Clauses in Commercial Contracts. 46 Geo. L.J. 260 at p.271 (1957).

¹⁶[1969] St. R. Qd. 378, aff'd on other grounds by the High Court of Australia (1970) 123 C.L.R. 418, Sub nom Freehold Land Investments Ltd. v. Queensland Estate Pty Ltd.

¹⁷Supra at p.38.

¹⁸Discussed in detail below. See infra at p.311 et seq.

¹⁹J.P. Niboyet. La Théorie de l'Autonomie de la Volonte. (1927) 16 Recueil des Cours 5.

argued that as autonomy does not exist in domestic law, it should have no place in the private international law of contracts. Prebble²⁰ submits that different considerations relating to contracts with multi state contacts not only justify but demand a treatment at variance with that accorded to purely domestic agreements. This view would seem preferable to that of Niboyet.

Having noted the criticisms that have been suggested from time to time about party autonomy this may be the appropriate place to briefly state the advantages of the doctrine.²¹

The great advantage of allowing party autonomy is that it achieves certainty. If the parties know that their choice of governing law is going to be applied they know in advance exactly where they stand. As Lando points out "The choice-of-law clause should be respected in principle. This uniformity ensures that such a party reference will relieve the parties of their uncertainty as to the law governing their contract."²²

²⁰Prebble at p.493.

²¹See generally O. Lando. Contracts. (1976) Chapter 24 Vol.3 Internat. Encyclopaedia of Comp. Law. at p.33.

²²Ibid.

In the absence of such a clause the law of the contract will often be unknown by the parties until after a court has considered the matter. In a later chapter²³ the goals of conflicts of laws are canvassed. At this point it need only be stated that certainty in commercial transactions is of paramount importance. Again in a later chapter²⁴ the American case law is reviewed and the 'ticket cases' provide a clear example of the need for certainty. For example in Siegelman v. Cunard White Star²⁵ Judge Harlan in the United States Court of Appeals pointed out that the major purpose of including a choice of law clause in the case was that Cunard White Star Ltd. would want a uniform result no matter where the ticket was issued or where the litigation arose. Uniformity and certainty were seen as valuable goals.²⁶

The goal of certainty cannot be over emphasised, and unless party autonomy is recognised this goal is jeopardised.

A second consideration in favour of party autonomy concerns expedience. Allowing parties to make an express

²³Infra Chapter I at p. 461 et seq.

²⁴Infra Chapter IV at p. 270 et seq.

²⁵221 F. 2d. 189 (2d Cir. 1955).

²⁶The action was brought by Mr. Siegelman against Cunard for injuries to his wife sustained whilst a passenger on Cunard White Star. The governing law clause specifying English law was applied.

choice of law in their contract relieves the court from the difficult task of ascertaining which law is to apply to the contract especially when facts are nicely balanced between various jurisdictions. This saves pressure on busy judges and courts and avoids litigation and the attendant time and cost to the parties.

On this point Judge Harlan stated in the above decision

"We see no harm in letting the parties' intention control ... Instead of viewing the parties as usurping the legislative function, it seems more realistic to regard them as relieving the courts of the problem of resolving a question of conflict of laws. Their course might be expected to reduce litigation, and is to be commended as much as good draftsmanship which relieves courts of problems of resolving ambiguities."²⁷

Another reason for allowing party autonomy which is often cited²⁸ is that party autonomy also satisfies the need for freedom. In many international commercial contracts the parties have creditable motives for their choice. They may want to use a certain formula that is internationally known; they may want to submit their contract to the country that dominates the market; they may want to select a "neutral" law or a law that is very developed in commercial law. These reasons may justify a choice of law clause and should be respected and upheld in international contracts.

The advantages of party autonomy are summarised by the Restatement (Second) Conflict of Laws 1971:²⁹

²⁷ 221 F. 2d. 189 at p.195. (2d. Cir. 1955)

²⁸ See Lando op. cit. supra n.21 on p.153 at p.33.

²⁹ Comment on Sec. 187(2). Comment (e) at p.565.

"Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may be best attained in multistate transactions by letting the parties choose the law to govern the validity of the contact and the rights created thereby. In this way certainty and predictability of results are most likely to be secured."

Having stated the advantages and disadvantages of party autonomy it is apparent that the advantages far outweigh any of the so called criticisms of the concept. Each of the eight criticisms canvassed above can be counteracted by a cogent argument. If party autonomy is not to prevail then uncertainty and unpredictability are introduced into an area of the law which needs clear and precise rules. In so far as the proper law doctrine upholds party autonomy it is to be praised, however the doctrine is wider than party autonomy and viewed overall it must be criticised. The concluding note on the proper law doctrine is a criticism of the concept in so far as the second and third rules are concerned and in so far as unsettled limits exist concerning the first rule. It is not a criticism of party autonomy which is seen as the only possible answer for international contracts.

Concluding Note on the Proper Law Doctrine

It has been said that the proper law doctrine is "an academic theory posing as a rule of law which is in fact non-existent and would be unnecessary if it existed."³⁰

³⁰J.G. Foster . Some Defects in the English Rules of Conflict of Laws. (1935). B.Y.B.I.L. 84 at p.93.

Whilst Foster's views are as extreme as Morris' in praise of the proper law doctrine it does seem that the concept is infinitely easier to state than to apply. There would be no reason for abandoning the doctrine if the only criticism concerned difficulty of application. However it is only a fiction that the abstract legal concept of a "contract" has a natural seat, or belongs to, or is proper to a particular legal system. Today many contracts may be seen as truly international. In recent years new types of contracts have appeared with respect to which the proper law doctrine is ill suited to supply an answer. Such is the case of both Euroloans, which by definition are "delocalized" operations³¹ and complex multi party or interrelated arrangements for carrying out large industrial, mining or other international projects. These contracts cannot be said to have a "proper law". Thus the very name given to the present system is inappropriate besides the many problems inherent in the doctrine as discussed above.

As America in general and New York in particular are very busy commercial parts of the world perhaps the laws applicable to international contracts on the other side of the Atlantic may have rules which New Zealand could adopt. It is the 'American solution' that is now discussed.

³¹G.R. Delaume. The European Convention on the Law Applicable to Contractual Obligations. Why a Convention? 22 No. 1 Virg. J. of Int'l L. 105 at p.121, Footnote 71 (1981) defines "delocalized operations" as those intended to reach a transnational community, as opposed to operations taking place within national markets.

PART BTHE "AMERICAN" SOLUTION

Chapter I	Introduction and Interest Analysis
Chapter II	The Restatement (Second) Conflict of Laws (1971)
Chapter III	The New York Uniform Commercial Code and Section 5.1401 of the New York General Obligation Law.
Chapter IV	New York Common Law Relating to Interstate and International Contracts

PART B.

Chapter I

INTRODUCTION AND INTEREST ANALYSIS

"Everyone now making a speech or writing an article on contracts in the conflict of laws begins by saying that this is 'the most confused subject in the conflicts of laws'."¹

"It is common for American Conflicts scholars to refer to contracts as the most complex and confused area of choice-of-law problems In large part, however, the scholars' signs of despair stem from the confusing diversity of choice-of-law rules which have been applied by United States courts in resolving contracts-conflicts problems."²

INTRODUCTION

The modern conflicts of laws in both England and America finds its roots in the eighteenth century common law³ and traditionally the law in this field has been regarded as

¹L. Nurick. Choice-of-Law Clauses and International Contracts. 54 Proceedings. Am. Soc'y of Int'l Law 56 (1960). Although a quarter century old this would still seem to be applicable. For example in this decade it has been said "Conflicts law as a whole is marked by ambiguity, but conflicts doctrine pertaining to the validity of contracts has been singularly characterised by confusion." F.J. Nicholson. Conflict of Laws. Annual Survey of Massachusetts Law. 255 at pp. 269-70 (1982). For a different view see F.K. Juenger. The E.E.C. Convention on the Law Application to Contractual Obligations: An American Assessment in Contract Conflicts. In the E.E.C. Convention on the Law Applicable to Contractual Obligations. A Comparative Study. (Ed. P.M. North) (1980) at p.295 who considers the most confused subject is tort choice of law if the 'dearth' of contract decisions in comparison to the 'glut' of torts cases is any indication. However he does go on to note that the "very complexity of the subject may be responsible for the rather meagre crop of judicial opinion" which rather goes against his argument. See however his footnote 2 at p.308.

²R.J. Weintraub. Choice of Law in Contract. 54 Iowa L.R. 399 (1968).

³See generally Prebble at p.436 et seq. R.H.Graveson. Comparative Evolution of the Principles of Conflict of Laws

"very similar".⁴

Justice Story's Commentaries⁵ which was the first general treatise on the subject treated English and American law the same. Likewise Beale's⁶ treatise of 1935 was "devoted to a careful study of the positive common law of England and America", and Reese,⁷ the Reporter of the Restatement (Second) of Conflict of Laws has pointed out that in preparing the drafts for the Restatement (Second) nearly as much consideration was given to English as to American cases and that "the drafts should, in general, be consistent with English law, since it is believed that there are few basic differences between the choice of law rules prevailing in England and in the United States."⁸ Likewise English writers have also pointed out, sometimes impliedly that the laws of England and America are similar. Dicey's first edition of Conflict of Laws, the leading English textbook attempted to cover the laws of both countries.⁹

in England and the U.S.A. (1960) 99 Recueil des Cours 21.

⁴Prebble at p.436, as opposed to Commonwealth Conflict of law which has been regarded as identical to English Conflict of law. See Prebble at p.436 footnote 6.

⁵J. Story. Commentaries on the Conflict of Laws. (1854) (1st edit.)

⁶See J. Beale. A Treatise on the Conflict of Laws Vol.1 (1935) at p.12.

⁷W.L.M. Reese. Contracts and the Restatement of Conflict of Laws. Second. (1960) 9 Int'l & Comp. L.Q. 531 at p.541.

⁸Ibid.

⁹See A.v. Dicey. A Digest of the Law of England with Reference to the Conflict of Laws.(1896). Prebble notes that this was not attempted in subsequent editions which fact

Prebble¹⁰ points out that "the casual observer" would consider this an odd state of affairs considering most American cases are interstate and subject to the United States constitution whilst English choice of laws for contracts are international and part of the common law. However the most important difference is that modern choice of law rules are built upon entirely different theoretical bases in America and England. Briefly English courts follow a classification and jurisdiction selecting method when faced with a choice of law problem, whereas the majority of American courts adopt what is known as the principles of interest analysis. Under the latter approach, a choice of law is made after an evaluation of the specific conflicting rules (not the conflicting jurisdictions) and of the relative interests of the different legal systems that have some connection with the case at bar. "Nevertheless, ironically, in view of the immense amount of theorising that takes place on the western side of the Atlantic the results reached by English and American courts in the field of contracts will usually be found to be the same."¹² Notwithstanding this comment it should be noted that this basic difference does affect many aspects of the subject, one example being the effects of events occurring after the

he (Prebble) attributes to the general lack of interest by English lawyers in what was happening on the other side of the Atlantic. See Prebble at p.437 footnote 10.

¹⁰Prebble at p.437 et seq.

¹¹Ibid at pp.437-8.

¹²Ibid at p.438.

making of the contract. It will be recalled¹³ that in England it is not legitimate to use as an aid anything the parties did or said after the contract was made.

"Otherwise one might have the results that a contract meant one thing the day it was signed but by reason of subsequent events something different a month or year later."¹⁴

In America however subsequent events are considered by the courts in so far as these subsequent events affect the state or states concerned.¹⁵ Thus whilst the origins of the subject may have been similar, at later stages¹⁶ differences were apparent and the object of considering the American approach in this decade is to see if the "American Revolution" has anything to offer New Zealand.

Because of the enormous number of contract cases with connections with more than one state and due to the volume of academic writing by American conflicts scholars on this subject it has been thought appropriate to limit the discussion on the American approach in some way. Consequently wherever possible New York decisions are used to illustrate rules or approaches or academic suggestions. The New York

¹³See supra at p.60.

¹⁴James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd. [1970] A.C. 583 at p.603 per Lord Reid.

¹⁵See Prebble at p.479 et seq. who points out that it is in American insurance litigation that post transaction events may most likely affect the choice of law. He gives examples on pp.479-80.

¹⁶E.g. 1920-1950's. See Prebble at p.440, footnote 29.

jurisdiction was chosen because of New York City's role as a leading international and financial centre.¹⁷ It may be likened to London in so far as courts in both jurisdictions are frequently faced with contract cases which have no obvious connection with New York or London.¹⁸ These jurisdictions are chosen because of a widespread belief that they have a well developed commercial law and that New York and English judges are competent, unprejudiced and experts in this field of law. New York courts are also faced with a higher percentage of international contracts rather than interstate contracts which are prevalent in less developed states of America. This fact also makes consideration of the New York jurisdiction more pertinent

¹⁷Technically the courts of last resort have the power to disagree with each other and develop discordant notions of choice of law. Whilst variations and differences in emphasis exist within America, New York represents the basic approach. See R.B. Schlesinger. Book Review 16 Am. J. Comp. L. 608 at p.614 (1968).

¹⁸See M. Gruson. Governing Law Clauses in Commercial Agreements - New York's Approach 18 Columbia J of Transnational Law 323 at p.325 (1979). (Hereinafter cited as Gruson governing law clauses). A recent statement by the New York Court of Appeals on New York's interest in fostering its role as a leading commercial centre is Erhlich-Bober & Co. v. University of Houston 427 N.Y.S. 2d. 604; (1980) where the court said:
 "Arrayed against (the policy of Texas law) is New York's recognised interest in maintaining and fostering its undisputed status as the pre-eminent commercial and financial nerve centre of the nation and the world access to a convenient forum which dispassionately administers a known, stable and commercially sophisticated body of law may be considered as much an attraction to conducting business in New York as its unique financial and communications resources." Ibid at pp.608-9.

for New Zealand. Finally two related introductory matters require noting before considering the American idea of interest analysis. The first is that complete isolation of individual approaches is not possible. For example, later academic writings build on earlier views and as Morris and North note "in a similar situation where the law is in a state of fluid development, in over 50 different jurisdictions, it is not surprising to find reliance in any one case on several, not wholly mutually consistent theories for the basis of the decision."¹⁹

Reese²⁰ has pointed out that the complexity of choice of law for contracts in America can be attributed in part to the fact that judges although they might have said they were applying a given rule interpret that rule to obtain a desired result. He cites the New York courts' former approach which relied on a number of theories and used whichever rule was felt best suited the case being litigated. "This practice, however, was not frankly recognized in the opinions; each customarily mentioned but a single rule and simply ignored what the courts had said on other occasions."²¹

The second related matter to note is that a certain confusion exists in the terminology used. Governmental

¹⁹Morris & North. Cases & Materials on Private International Law (1984) at pp.697-8.(Hereinafter cited as Morris & North).

²⁰W.L.M. Reese. Power of Parties to Choose Law Governing Their Contract. 54 Proceedings. Am Soc'y of Int'l Law 49 (1960).

²¹Ibidat p.50 et seq.

interest analysis or just interest analysis is used by some writers to refer to a number of theories which because of their general characteristics may be considered as part of interest analysis, whilst on the other hand it may be used more specifically to refer only to Currie's theory.²² Reppy²³ defines eclecticism as an approach involving use by the court of two or more distinct choice of law methods or parts of those methods, in deciding a single choice of law issue, whilst he defines "method" as a theory for reaching a choice of law result. Thus for example the *lex loci contractus* and 'centre of gravity' theory may both be seen as a method, whilst interest analysis "describes perhaps a dozen different methods," or theories.²⁴

INTEREST ANALYSIS

Introduction

"The term 'interest analysis' has come to include a wide variety of scholarly and judicial opinion concerning the proper functioning of the choice of law process."²⁵

Generally speaking it may be said that interest analysis involves the court in making an assessment of the conflicting rules involved in the dispute rather than directing the court to apply fixed rules to a give case. An enormous amount has been written on interest analysis, both in praise

²²It is used in its wider sense in the following pages.

²³W.A. Reppy. *Eclecticism in Choice of Law; Hybrid method or Mishmash?* 34 Mercer L.R. 645 at p.645 (1982-1983).

²⁴*Ibid* at p.647.

²⁵See Prebble at p.447 for a general introduction and criticism. See H.H. Kay. *Theory into Practice: Choice of Law in the Courts.* 34 Mercer L.R. 521 (1982-1983).

and condemnation of it generally and of the many specific varieties of it in particular. The following discussion emphasises the more important theories from a contracts point of view.²⁶

The word 'interest' comes from the theory that in every conflicts case each state that is connected with a transaction may in some way be interested in the result. This interest is apparent and manifests itself in the various policies of the state or states concerned, and the policies may be ascertained from the local laws of the relevant jurisdictions. Having established the various interests involved in the case the court's duty is to apply the law of the state or country which is seen to be most concerned with the determination of the particular issue in the case. It is in the way to achieve this that American scholars differ in their views, which considering the enormity of the task involved is not surprising. It may be argued that interest analysis is more appropriate to "solving" tortious problems than interstate and international contracts as it is difficult to conceive of policies or interests (except in very general terms) which affect contracts.²⁷ However it has been and is used in the United States and so the following specific theories are discussed in the following order:

²⁶Although some articles referred to relate to torts they are noted because they are considered equally pertinent in the given context to contract law.

²⁷Discussed *infra* at p.198.

1. Currie's Governmental Interest Analysis.
2. Cavers' Principles of Preference.
3. The Rheinstein Method.
4. The Comparative Impairment Approach.
5. The Functional Approach.
6. The Forum Centred or True Rules Approach.
7. Leflar's 'Better Law' Approach.
8. The 'Contract' (or 'Centre of Gravity' or Grouping of Contacts Approach, or Significant Contacts Approach.)

Having considered these specific theories of interest analysis the concept of party autonomy is discussed in the New York setting. This involves a consideration of both the Restatement (Second) of Conflict of Laws Adopted by the American Law Institute in 1969 and the Uniform Commercial Code with special reference to the latest New York Uniform Commercial Code. The New York Common Law concludes Part B.

Governmental Interest Analysis

"The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned."²⁸

Although Currie was not the first scholar to suggest that decisionmakers should consider government "interests" when resolving a choice-of-law controversy, he was the first to incorporate the idea into a specific theory.²⁹ Writing in 1963 he said:

"1. When a Court is asked to apply the Law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies. In making these determinations the Court should employ the ordinary processes of construction and interpretation.

2. If the Court finds that one state has an interest in the application of its policy in the circumstances of the case and the other state has none, it should apply the law of the only interested state.

3. If the Court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflicts.

4. If, upon reconsideration, the Court finds that a conflict between the legitimate interests of two states is unavoidable it should apply the law of the forum."³⁰

²⁸O. Holmes. The Common Law. (1881) at p.35.

²⁹See L.L. McDougal. Choice of Law: Prologue to a Viable Interest-Analysis Theory. 51(2) Tulane L. Rev. 207 at p.237 (1977).

³⁰See also Enrenzweig's view at pp.183-4 discussed below at p. Although the reference to the 1963 article refers to Babcock v. Jackson 12 N.Y. 2d. 473 (1973) a torts case, the six points above are equally applicable to contracts. See for example B. Currie. Notes on Methods and Objectives in the Conflict of Laws. Duke L.J. 171 at p.178 (1950).

5. If the forum is disinterested, but an unavoidable conflict exists between the laws of the two other states, it should apply the law of the forum - until someone comes along with a better idea.

6. The conflict of interest between states will result in different dispositions of the same problem, depending on where the action is brought. If with respect to a particular problem this appears seriously to infringe a strong national interest in uniformity of decision, the Court should not attempt to improvise a solution sacrificing the legitimate interests of its own state but should leave to Congress, exercising its powers under the full faith and credit clause, the determination of which interest shall be required to yield."³¹

Currie in developing his Governmental Interest Analysis distinguished between three types of conflicts; a true conflict exists where two jurisdictions have identifiable policies that would be furthered by the application of their respective laws. In a false conflict³² one state has no claim (or a spurious claim) for the application of its law and the other state has a legitimate claim whilst the third situation is the "unprovided for" case where "neither state cares what happens"³³ or a disinterested forum is unable to choose between competing policies in which it has no stake.³⁴

Currie insisted that the forum should not resolve true conflicts because balancing the relative importance of competing

³¹B. Currie. Comments on Babcock v. Jackson. A Recent Development in Conflict of Laws. 63 Columbia L.R. 1212 at pp.1242-3 (1963) and see B. Currie. Selected Essays on the Conflict of Laws.(1963).

³²See generally P.K. Weston. 'False Conflicts' 55 Calif. L.R. 74 (1967).

³³Currie op. cit. supra at n.31 at p.152.

³⁴Ibid. See Ch. 3 generally. See also B. Currie. The Disinterested Third State. (1963). 28 Law & Contemp. Probs. 754.

state interests is not a judicial function, it ".... is a political function of a very high order. This is a function that should not be committed to Courts in a democracy. It is a function that the Courts cannot perform effectively for they lack the necessary resources."³⁵ McDougal³⁶ suggests Currie's approach "is still less than fully helpful" and has 'parochial' characteristics - presumably a reference to the *lex fori* applying in a true conflict situation. Sedler³⁷ has "reformulated" Currie's approach, first Sedler suggests that if the forum has a 'real interest' it applies forum law assuming this will not be fundamentally unfair to the other party. Secondly if the other state and not the forum has a real interest that law is applied again assuming no fundamental unfairness. Thirdly "when neither state has a real interest in applying its law on the point in issue, the choice of law decision should be made with reference to the common policies reflected in the laws of the involved states."³⁸

Kramer³⁹ suggests that in order to determine whether it is a true or false conflict situation regard must be had

³⁵Currie op. cit. supra n.31 at p.182.

³⁶Op. cit. supra n.29 at p.242.

³⁷R.A. Sedler. Choice of Law in Michigan: A time to go Modern. 24 No. 3 Wayne L.R. 829 at p.835 (1978).

³⁸Ibid at pp.835-6.

³⁹R. Kramer. Interest & Policy Clashes in Conflicts of Laws. Vol. XIII Rutgers L.R. 523 (1959).

to three types of interests; these are 'public at large', individual and group interests respectively. Ratner⁴⁰ on the other hand suggests three policy values to be taken into consideration in the conflict cases, namely the avoidance of internal policy stultification, "home protection" and "fulfilment of expectations."⁴¹

Westbrook⁴² considers that viewed as a whole Professor Currie's approach is "basically a philosophy of surrender" which does not provide a complete answer to the choice of law problem. However, it does achieve greater certainty by referring the court back to the forum than other approaches which require the court to choose between conflicting state interests. As noted above much of the writing on governmental interest analysis has been in the context of torts and obviously many of the considerations are more applicable in that context. Ratner's "home protection"⁴³ is one such example; however this does not mean that Currie's approach has not been used in contract situations.⁴⁴

Before turning to Cavers' views it may be noted that analysing a case to see if it presents a true or false con-

⁴⁰L.G. Ratner. Choice of Law, Interstate Analysis and Cost Contribution. No. 3. 47 So. Calif. L.R. 817 at p.824 (1973-1974).

⁴¹Ibid at pp.826-7.

⁴²J.E.Westbrook. A Survey and Evaluation of Competing Choice of Law Methodologies: The Case for Eclecticism. 40 Missouri L.R. 407 at p.419 (Summer 1975).

⁴³Op. cit. supra n. 40.

⁴⁴An example is given infra at p.196 See also Chapter 4 at p.270 on the New York common law.

flict is a hallmark of the interest analysis approach.⁴⁵ The term 'false' has been used in at least six different ways⁴⁶ but the two major views of what constitutes a false conflict may be summarised as follows. In the first situation the court discovers that the domestic law of both or all interested jurisdictions is identical and thus the conflict may be said to be truly false. Whilst all writers would agree this is a false conflict situation, many other American scholars consider that it is also a false conflict if on enquiry it is established that one state has a considerable interest in having its domestic law applied whilst the other state or states has proportionately less interest in applying its law to the contract. Others would see this as an "easy" true conflicts case.⁴⁷

⁴⁵Prebble at p.466.

⁴⁶Comment. False Conflicts 50 Calif. L. Rev 74 (1963).

⁴⁷Weston op. cit. supra n.32.

Principles of Preference Approach

Cavers⁴⁸ advocates an approach which in many ways is similar to that of Currie. In Cavers' view the difficulty of interest analysis is not in ascertaining the purpose behind laws but rather the difficulty resulting from the fact that often laws have multiple purposes which may point in opposite directions.⁴⁹ Cavers and Currie differ most sharply when interest analysis does not reveal a false or readily avoidable conflict. Currie at this point asserted that an interested forum should apply its own law. Cavers, however, believes that it is the responsibility of the court:

"... to seek a rule for choice of law or a principle of preference which would either reflect relevant multistate policies or provide a basis for a reasonable accommodation of the laws' conflicting purposes. A principle of preference would be applicable to all cases having the same general pattern of law and fact and would identify a preferred result on choice-of-law grounds. If the case could not thus be generalised, the court should state the reasons leading it to prefer one result to the other on choice-of-law grounds. In either case it should apply the law leading to the preferred result."⁵⁰

Cavers has suggested in his book various principles of preference for certain areas of conflict of laws. Concerning contracts he said that where 'protective' legislation exists it should be evoked against a party where

⁴⁸See D.F. Cavers. The Choice of Law Process. Especially Ch. vii (1965).

⁴⁹Ibid at p.108.

⁵⁰Ibid at p.64.

a person has a home in the state (if the law's purpose was to protect that person) and the transaction was "centred" there or if it were not, this was due to facts that were fortuitous or had been manipulated to evade the protective law.

If the parties made an express (or reasonably preferable) choice of law decision that was reasonably related to the contract then a court should uphold such a choice. However Cavers considered that this too should be subject to the principle that protective legislation should prevail despite a choice of law clause.⁵¹

A decade later Cavers⁵² wrote

"The modern state surrounds the individual with a protective screen of restrictions on the conduct of his fellows This protective screen extends also to the exercise of contractual powers ... and its safeguards may be reinforced either by the remedy of damages or simply by denying the state's aid in the enforcement of offending agreements ... Modern conflicts arise because transactions involve two or more states that offer different degrees of protection.

..... The resolution of conflicts ... could... be greatly simplified if the courts and legislators would expressly address the following questions: in choosing between two laws, under what circumstances should we prefer the more protective law?"⁵³

Cavers' principles have been considered in Europe. For example the drafters of the Swiss code considered at length

⁵¹Ibid at p.181.

⁵²D.F. Cavers. A Critique of the Choice-of-Law Process: Addendum 1972. 17 Harv. Int'l L.J. 651 (1976).

⁵³Ibid at pp. 655-6.

whether to use Cavers' principles,⁵⁴ and many of his colleagues in the United States have hailed his principles as a significant contribution to the American Revolution of Conflicts law.⁵⁵ Cavers may be seen as espousing an approach half way between those advocating the ad hoc approach of interest analysis and those advocating narrow rules.⁵⁶ Although the principles of preference are rather general, they are rules blending domiciliary and territorial factors and forge a link between geography and teleology.⁵⁷ Taking a middle way he is criticised by those on either side.⁵⁸ Reese has suggested that the principles of

⁵⁴See F. Vischer. Drafting National Legislation on Conflict of Laws: The Swiss Experience. (Spring 1977) 41 No. 2 Law & Contemp. Probs. 131 at p.143. It was decided to take a "more neutral approach ... the draft, in the chapter on contracts, adheres to the principle that those contracts where one party normally has a special need for protection are subject to the law of the State at that party's habitual residence; in labour contracts, to the law of the State of the normal place of employment. A party should not be deprived of the protection given by the law on which he normally relies and which is the law of his 'home' state. This principle is also a limit on party autonomy." Ibid at p.143. The Swiss Code influenced the E.E.C. Convention on the Law Applicable to Contractual Obligations (1980).

⁵⁵E.g. H.H. Horowitz. The Law of Choice of Law in California. A. Restatement. 21 U.C.L.A.L. Rev. 719 at p.780 (1974) believes that the principles of preference: "will surely be the form which the choice of law rules of the future will take."

⁵⁶E.g. Currie as opposed to Reese and Rosenberg. See infra at n.59 p.176.

⁵⁷R.L. Felix. The Choice of Law Process at a Cross-road. 9 Duquesne L. Rev. 413 at p.414 (1971).

⁵⁸Compare for example the views of H.W. Baade. Counter-Revolution or Alliance for Progress? Reflection on Reading Cavers, the Choice of Law Process. 46 Tex. L. Rev. 14 (1967) with M. Rosenberg. Symposium on the Value of Principled Preferences. 49 Tex. L. Rev. 211 (1971).

preference will not be useful until precise rules are formulated;⁵⁹ however Cavers⁶⁰ believes that general principles of preference will be of more use in the long term because they will have broader applicability than narrow rules.⁶¹

Westbrook⁶² suggests that the "greatest strength" of the Cavers approach lies in the fact that he seeks to further the purposes and policies underlying state law without exposing lawyers and litigants to the expense and uncertainty which accompany a case by case analysis of governmental interests.

It is suggested that in so far as Cavers allows party autonomy his theory is commendable. However if no choice has been made it is very difficult to apply a law leading to "the preferred result." Whilst much legislation may be seen as protective, many rules for contract law are arbitrary in the sense that the rule provides a way of resolving an impasse irrespective of anything else. Take for example the rule in England that acceptance of an offer is complete on posting. In Germany the acceptance must be received. If

⁵⁹W.L.M. Reese. Choice of Law. Rules of Approaches. 57 Cornell L. Rev. 315 at p.324 (1972).

⁶⁰Cavers op. cit. supra n.48 at p.133.

⁶¹He suggested (ibid) that long intervals are likely to elapse before reported decisions involving narrowly defined conflicts rules emerge.

⁶²Westbrook op. cit. supra n.42 at p.460.

an international contract concerned this point Cavers' principles of preference do not assist.

The English and German rules are not concerned with protection or moral consideration. Both are neutral, both are satisfactory rules in so far as they solve an issue of contract law. As long as everyone knows the rule and the rule is upheld by the court the question of communication of acceptance is covered. Cavers' principles lack ease of application.

The Rheinstein Method 63

Rheinstein's view is that much of the difficulty in choice of law arises because "writers came to regard it as the task of conflicts law to demarcate from each other the spheres of proper exercise of the power of sovereign states to regulate human activities."⁶⁴ He suggests that the true task of conflict law is to mitigate the hardships for individuals which result from differences in the rules of decision by which the conduct of private individuals is measured.⁶⁵ His thesis is that the main purpose of choice of law rules - indeed the very *raison d'être* - is to protect the justified expectations of private individuals.⁶⁶ Rheinstein considers that the ideal situation would be one whereby each individual could know in advance by what state's law his conduct will be measured.

Rheinstein, like Ehrenzweig,⁶⁷ views the approach taken by the governmental interest analysis school as mistaken in its belief that the purpose of conflicts law is to decide which of competing government interests shall prevail.⁶⁸

⁶³Summarised by Cavers op. cit. supra n.48 at pp. 63, 67-9.

⁶⁴M. Rheinstein. Ehrenzweig on the Law of Conflict of Laws. 18 Okla. L. Rev. 238 at p.240 (1965).

⁶⁵Ibid at p.241.

⁶⁶M. Rheinstein. The Place of Wrong: A Study in the Method of Case Law. 19 Tul. L. Rev. 4, at pp.17-31 (1944).

⁶⁷See infra at p.185.

⁶⁸M. Rheinstein. Book Review. 32 U. Chi. L. Rev. 369 at p.375 (1965).

Whilst law can be seen as a body of rules and regulations which are enforced by the state it is easy to view rules of law as rules of conduct addressed by the sovereign to individuals which in turn make it natural to view conflicts of law as providing guidance as to which sovereign's command shall prevail.⁶⁹ Rheinstein points out that it is possible to view law differently - instead of being directed beyond the parties concerned, rules of law may be seen as addressed to individuals as rules of conduct.⁷⁰ It has been noted⁷¹ that this "makes a difference in conflicts thinking because the emphasis shifts from accommodating the conflicting demands of sovereigns to a more important consideration - the parties' expectations."

The protection of justified expectations can best be accomplished, according to Rheinstein, by relying on narrow jurisdiction selecting choice of law rules developed to deal with specific problems. He would develop rules through a functional approach by analysing the problems raised in concrete situations. Rheinstein believes that there is a widespread misconception in the United States concerning the way to classify matters; he considers that what should be classified is the problem itself rather than the statute or rule of law involved, and then once having classified the fact situation a rule should be there to

⁶⁹Ibid at p.373.

⁷⁰Ibid.

⁷¹Westbrook op. cit. supra n.42 at p.419.

apply to it.⁷² In so far as Rheinstein advocates rules rather than approaches his views are similar to those of Reese.⁷³ Both criticise the first Restatement's attempt to provide a few all-embracing rules rather than provide detailed specific ones and both emphasise the importance of party expectation. However Westbrook's⁷⁴ conclusion that Rheinstein places far greater emphasis on this than Reese would seem correct.

Rheinstein was considering choice of law generally, however his thesis would appear particularly relevant to contract cases. Whilst some would argue that the state has an apparently increasing interest in protecting certain persons in transactions they choose to enter, the state's interest is nevertheless considerably less significant than in, say, tortious situations where protection of one's own citizens is of greater concern to the state and where party expectations play a far lesser role than they do in contract law.

⁷²Rheinstein considers that this is what is done in European jurisdictions especially Germany. See M. Rheinstein. *How to Review a Festschrift*. 11 Am J. Comp. L. 632 at p.660 (1962).

⁷³See *infra* at p.466 et seq.

⁷⁴Westbrook *op. cit. supra* n.42 at p.421.

The Comparative Impairment Approach ⁷⁵

Here, the court is asked to measure the comparative impairment of the policies of the two states if the law of the other state was applied. Baxter, an exponent of this view, suggests that when a court determines which state's internal objectives will be least impaired it is doing something ".... very different in kind from the weighing process often referred to by similar rubrics, but the two are often confused"⁷⁶ He suggests that the fact that "super value judgments are separable from the comparative impairment principle is one of the cornerstones ..." ⁷⁷ of the approach.

⁷⁵See generally L. Kanowitz. Comparative Impairment and Better Law; Grand Illusions in the Conflict of Laws. 30 Hastings L. Rev. 255 (1978) and H.H. Kay. The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience. 68 Calif. L. Rev. 577 (1980).

⁷⁶W.F. Baxter. Choice of Law & The Federal System. 16 Stanford L.R. 1 at p.18 (1963).

⁷⁷Ibid.

The Functional Approach

Here the court firstly ascertains which jurisdictions are concerned and then constructs a rule for each relevant jurisdiction. If these rules conflict then the next step is to determine whether or not one jurisdiction is predominantly concerned. A jurisdiction is predominantly concerned if analysis reveals that even though the domestic policies of the concerned jurisdictions are of relative equal weight, that of one jurisdiction in light of its relation to a multistate transaction far outweighs that of the other jurisdictions, or that one jurisdiction has a greater "aggregation of concerns"⁷⁸ than do the other jurisdictions. Should there be no predominantly concerned jurisdiction then analysis may reveal that "the claims of one jurisdiction are so clearly superior" that it should be recognised.⁷⁹ In this situation the *lex fori* is applied if the forum is concerned and if the forum is neutral it applies the concerned jurisdiction whose law "most closely approximates" the law of the forum.⁸⁰

This approach was developed by Von Mehren and Trautman; the former also considered the possibility of developing special substantive rules for multistate problems. These rules are not necessarily to be chosen from amongst the provisions of the conflicting domestic jurisdictions con-

⁷⁸A.T. Von Mehren & D.T. Trautman. *The Law of the Multistate Problem*. (1965) at pp.341-2.

⁷⁹*Ibid* at p.77.

⁸⁰*Ibid* at pp.407-8.

cerned. Von Mehren⁸¹ discusses three types of situations where such rules could be advantageously applied. For the first situation he envisages a fact situation where two legal orders are both sufficiently concerned so that both rules should be given effect to but the two laws do not lend themselves to cumulative application. Secondly are those situations which because of their multistate characteristics involve considerations which do not have particular significance in comparable domestic settings,⁸² and thirdly come the true conflict situations.⁸³

Von Mehren admits that the legislature is not likely to be active in developing these rules and so their formulation would be left to the judiciary and here he notes the "traditional hesitancy" to accord law making functions to the courts and "the general reluctance of all contemporary societies to assign additional tasks of great complexity and difficulty to already over burdened courts."⁸⁴ Cavers⁸⁵ recognised "the logical alternative that a rule derived from none of the domestic laws in question should be fashioned for the case" but rejected the approach on the grounds that

⁸¹A.T. Von Mehren. Special Substantive Rules for Multistate Problems: Their Role & Significance in Contemporary Choice of Law Methodology. 88 Harv. L.R. 347 (1974).

⁸²Ibid at p.358.

⁸³Ibid at p.367.

⁸⁴Ibid at p.357.

⁸⁵D.F. Cavers. A Critique of the Choice of Law Problem. 47 Harv. L.R. 173 at p.193 (1933).

the judge would lack guidance and that further multiplication of the rules of substantive law is undesirable.

The difficulties attached to the functional approach are obvious and numerous - what criteria should be used to determine a predominantly concerned jurisdiction; when is a claim superior; to name but two obvious difficulties.

The Forum Centred or True Rules Approach

Ehrenzweig, champion of the *lex fori* looks at past decisions to see the "real" or "true reasons" for the application of a particular legal system. If no true rule was apparent then Ehrenzweig suggested that the *lex fori* govern unless on the policy grounds of the forum it should be displaced.⁸⁶ Ehrenzweig contended that American Conflict Law had developed true rules of choice in most of those situations in which parties can claim to have taken into account a specific law.

"What is thus left for the residuary *lex fori* ... are essentially such liabilities as those for breach of contract ... as to which application of forum law cannot be said to defeat a party's justified expectations....."⁸⁷

Ehrenzweig's views are similar in their conclusion to those of Currie discussed above.⁸⁸ He did however arrive at his result by a different path.⁸⁹ First he considered that reference to choice of law rules and foreign law was essentially abnormal but that there were in certain areas well established rules where the court did apply foreign law. Where a case fell to be decided where there was no

⁸⁶A.A. Ehrenzweig. *The Lex Fori: Basic Rule in the Conflict of Laws*. 58 Mich. L.R. 637 (1960) also A.A. Ehrenzweig. *A Treatise on the Conflict of Laws*. (1962). Ch. 4 especially at pp.352-3.

⁸⁷A.A. Ehrenzweig. *A Proper Law in a Proper Forum: A "Restatement" of the Lex Fori Approach*. 18 Okla. L.R. 340 at p.352. (1965).

⁸⁸See *supra* at p. 168 et seq.

⁸⁹See R.B. Schlesinger. Book Review, 16 Am. J. Comp. L. 608 at pp.610-2 (1968).

established rule then Ehrenzweig considered there must be reference to public policy and this could only be the forum's public policy, reference to which would usually result in the court applying forum law. (He admitted that some super law which all states were bound to obey could provide the necessary guidelines but that no such law existed.) Ehrenzweig realised that application of his theory could result in forum shopping but felt that this could be overcome by tightening the rules relating to jurisdiction.

Whilst Currie and Ehrenzweig have support for their forum favouring ideas⁹⁰ it has been suggested⁹¹ that the courts are unlikely to adopt such an approach as it would require wholesale legislative revision of American rules of jurisdiction.

Finally Ehrenzweig's⁹² views on the desirability of

⁹⁰Cheatham, Reese, Rheinstein and Shapira all advocate a preference for application of the *lex fori*. See E. Cheatham & W.L.M. Reese. *Choice of the Applicable Law*. 52 *Columb. L. Rev.* 959 at p.965 (1952). Rheinstein *op. cit.* supra n.64 at pp.239-40 and A. Shapira. *The Interest Approach to Choice of Law*. (1970) (Shapira's book is however written with reference to tort cases but his theory can be applied to contract cases).

⁹¹Prebble at p.473.

⁹²See A.A. Ehrenzweig. *Interstate and International Conflicts Law: A Plea for Segregation*. 41 *Minn. L. Rev.* 717 (1957).

separating interstate from international contracts is of interest. He advocates separate treatment for the two types of contracts and has gone so far as to write text books on each.⁹³ His view here contradicts the Restatement (Second) of Conflict of Laws⁹⁴ which suggests there should be no difference between interstate and international contracts.

⁹³A.A. Ehrenzweig. Private International Law. (1967) and A.A. Ehrenzweig. Treatise on the Conflict of Laws (1962). Some American articles deal only with international contracts, see also R. Johnston. Party Autonomy in Contracts Specifying Foreign Law. 7 Williams & Mary L.R. 37 (1966).

⁹⁴Section 10. Restatement (Second) Conflict of Laws.

The "Better Law" Approach

In 1952 Cheatham and Reese identified nine factors relevant in determining which law should apply.⁹⁵ Reese subsequently added a tenth⁹⁶ whilst Yntema⁹⁷ went on to list no less than seventeen considerations reducible to two primary groupings, namely security and comparative justice. However, it is Leflar's⁹⁸ 'choice-influencing considerations' which seem to have achieved the most popularity in the United States. The five considerations are:

- (a) the predictability of results.
- (b) the maintenance of interstate and international order.
- (c) simplification of the judicial task.
- (d) advancement of the forum's governmental interests.
- (e) application of better law.

⁹⁵Cheatham and Reese op. cit. supra n.90. In order of importance they are (i) the needs of the interstate and international system; (ii) application of local law unless there is good reason for not doing so; (iii) the effectuation of the purpose of the relevant local rule in determining a question of choice of law; (iv) certainty, predictability, uniformity of results; (v) protection of justified expectations; (vi) application of the law of the state of dominant interest; (vii) ease in determination of applicable law, convenience of the court; (viii) the fundamental policy underlying the broad local law field involved; and (ix) justice in the individual case.

⁹⁶The court must follow the dictates of its own legislature, provided these dictates are constitutional. W.L.M. Reese. Conflict of Laws and the Restatement (Second). (1963) 28 Law & Contemp. Probs. 679 at p.682.

⁹⁷H.E. Yntema. The Objectives of Private International Law. 35 Can. Bar Rev. 721 at pp.734-5 (1957).

⁹⁸R.A. Leflar. American Conflicts Law. (1977) (3rd edit) at p.195 (hereinafter referred to as Leflar). See also R.A. Leflar. Choice-Influencing Considerations in Conflicts Law. 41 N.Y.U.L. Rev. 267 (1966). R.A. Leflar. Conflicts Law: More on Choice-Influencing Considerations. 54 Cal. L. Rev. 1583 (1966).

These considerations are not listed in order of importance and Leflar specifically limited the number of considerations to a manageable number which could be used as a practical basis for making decisions. He said "no priority among the considerations is intended from the order of listing. Their relative importance varies in accordance to the area of law involved. Some will be more important in one area of law, others in another. But all should be considered regardless of the area."⁹⁹

Leflar points out that most choice of law cases require a deliberate choice between the opposing rules of two states. At one time, he suggests, judges would have self-consciously denied that they gave any weight to the quality of the rules of law between which choice was made. "A vested rights approach called for a choice between states not between laws, and there was thought to be some tinge of the unethical in the conduct of a judge who unlike blind justice admittedly opened his eyes to see the consequences of his choice."¹⁰⁰

What actually happens, accord to Leflar¹ is that the lawyer starts by characterising his problem so that he knows what area of law is involved, he then looks up the laws of the connected states to see which would best suit his client. Then he looks at the conflicts rules which choose a state rather than a law and selects a characterisation or a conflicts theory that will under the rules lead him to the

⁹⁹Leflar at p.198. One wonders why therefore he saw fit to alter the list around. In the second edition (1968) consideration of the better law is listed first whilst it appears last in the 1977 edition.

¹⁰⁰Ibid at p.200.

¹Ibid at p.198 et seq.

previously chosen law with its desired results. When the lawyer appears in court he reverses his reasoning process and argues firstly his conflicts theory which leads to the conclusion he desired and which he started with. Leflar suggests that the court realises that this is in fact what lawyers do, and that they, the judges, also look at the content of laws in order to achieve justice.

Reppy² likewise suggests that the judge decides the result he wants and then applies methods that achieve this, also the judge may well decide which is the better law but being "too embarrassed" to openly state this applies a combination of methods which arrives at the same end result.

Leflar has been much criticised for his theory. For example McDougal³ notes that Leflar's factors are "at a high level of abstraction" which means courts will have to use an "inordinate amount of discretion" and this could lead to unpredictability. In a 'true conflict' the court presumably has still to determine which is the better law and this requires the making of value judgments and this can lead to a "mindless homeward trend" and should not be encouraged.⁴ "The court is assuming powers which should be left to its state's legislature if it applies another state's law because of a belief that it is superior to a forum statute"⁵

²Reppy op. cit. supra n.23 at p.650 et seq.

³McDougal op. cit. supra n.29 at p.249.

⁴D.F. Cavers. In Symposium on the Value of Principled Preferences. 49 Texas L.R. 221 at p.221 (1971).

⁵Westbrook op. cit. supra n.42 at p.461.

Jaffey⁶ has recently stated that "if it is proper for a court to select the rule of one country rather than another on the ground that it is better, why stop short of inventing ad hoc a rule which seems to the court even better than any existing one." Whilst Morris & North⁷ have said

"Many commentators frown on the application of the better rule of law, and with good reason. It is not the function of the courts to reform the law of other countries (still less of their own country) by giving it the narrowest possible scope or refusing to apply it in a conflict of laws case. That is a task better left to legislatures or law reform bodies. As Cavers⁸ says, to ask the judge simply to express a preference between two rules of law on the grounds of justice and convenience 'is to abolish our centuries-old subject'."⁹

If unacceptable to European writers Leflar does have support within the United States. Juenger,¹⁰ Reppy,¹¹

⁶A.J.E. Jaffey. The Foundations of Rules for the Choice of Law. 2 Oxford J. of Legal Studs. 368 (1982).

⁷Morris & North at p.741.

⁸Cavers op. cit. supra n.48 at p.86.

⁹This note by Morris & North comes at the very end (p. 741) of Chapter 30 entitled "American Methods for Choice of Law". The authors outline and illustrate by cases true and false conflicts, Governmental Interest Analysis, Comparative Impairment, Principles of Preference, The Most Significant Relationship test, the Restatement (Second) as well as Leflar's Choice Influencing Considerations. Such would appear to be the anathema for Leflar's "Better Law" that the authors are unable to refrain from a criticism of it. It is to be noted that they do not criticise or evaluate the other approaches discussed.

¹⁰Juenger op. cit. supra n.1 on p.159 at p.302 and F.K. Juenger. Choice of Law in Interstate Torts. 118 U.Pa. L. Rev. 202 at p.233 et seq. (1969).

¹¹Reppy op. cit. supra n.23 at p.650 et seq.

Weintraub¹² and Westbrook¹³ all to a greater or lesser degree praise aspects of his theory, but even here criticism of the better rule of law criterion occurs. Westbrook¹⁴ quotes Cavers as taking the correct view namely that although Leflar is right in saying that judges do consider which is the better law it is only a tendency which should be recognised not encouraged.

However at the end of the day Leflar's considerations may be seen as having been adopted by the important section 6 of the Restatement (Second) Conflict of Laws.¹⁵

¹²R.J. Weintraub. A Method for Solving Conflict Problems - Torts. 48 Cornell L.Q. 215 at p.249 (1963).

¹³Westbrook op. cit. supra n.42 at p.460 et seq.

¹⁴Citing Cavers op. cit. supra n.48 at p.215.

¹⁵Discussed infra at p.203 et seq.

The 'Contacts or 'Centre-of-Gravity' or Grouping of
Contacts or Significant Contact Approach

Here the law of the jurisdiction with the most 'contacts' with the contract prevails. There appears to be some confusion over terminology here. Nicholson¹⁶ for example says (whilst discussing the retreat from the vested rights theory)

"The contacts methodology brings a more functional and less mechanical analysis to the cases. The following theories have been the most influential in promoting the contacts approach: (1) the late Professor Brainerd Currie's 'governmental interest' analysis; (2) the Restatement (Second) of Conflict of Laws 'most significant relationship' rule; (3) Professor Robert Lefflar's five 'choice-influencing considerations' analysis. Although there are differences of emphasis among these three formulations, they agree in stressing the importance of evaluating all the substantial contacts of the conflicts situation. They reject the exclusive, one-dimensional lex loci rule."¹⁷

Whilst a little later he seems to view the approach as something more specific by saying:

"One new approach to the validity of contract problem, which is receiving increasing approbation by courts and publicists, is the 'center of gravity' or 'grouping of contacts' theory. A lucid exposition of the theory can be found in the New York Court of Appeals decision in Auten v. Auten."

and

"The Restatement (Second) of Conflict of Laws has aligned itself with the 'contacts' standard enunciated in the Auten case. In rejecting the dogma of lex loci contractus, it states that the validity of a contract is governed by the law of the state with which the transaction has 'its most significant relationship'."¹⁸

¹⁶See generally F.J. Nicholson. 29 Annual Survey of Massachusetts Law 255 (1982).

¹⁷Ibid at pp.255-6.

¹⁸Ibid.

Weintraub¹⁹ likewise equates 'centre of gravity' with Section 188 Restatement (Second). He says

"In the absence of a choice-of-law clause in the contract in issue, the emerging consensus of United States courts appear to be that questions of validity should be controlled by the 'centre of gravity' of the transaction, this being the state having the most significant relationship with the parties and with the transaction."

It will be shown below²⁰ that the New York approach to choice of law for contracts has adopted this approach in preference to all the previous approaches. Interest analysis, as a specific approach is occasionally used²¹ but the overwhelming choice has been the 'centre of gravity' approach coupled with party autonomy. As these two approaches dominate in New York an illustration of their application in actual cases seems appropriate by way of introduction to a more detailed review of New York law which is undertaken below.

Perhaps the best known example of the 'centre of gravity' approach is Haag v. Barnes²² which involved an Illinois resident who had promised to pay \$275 per month to a New York resident who was the mother of an ex nuptial child. The agreement stated that "it shall in all respects be interpreted, construed and governed by the laws of the State of Illinois." The plaintiff had become pregnant in New York but at the defendant's wish had had the baby

¹⁹Weintraub op. cit. supra n.2 on p.159 at p.412.

²⁰Infra at p.270 et seq.

²¹Infra at p.301.

²²216 N.Y.S. 2d. 65 (1961). Although not a commercial contract it is cited because it has been applied by New York courts in commercial situations. See infra at p.301 et seq.

in Chicago. Following the birth the mother lived for two years in California before returning to New York. The defendant supported the mother and child in compliance with the agreement and made large additional payments. The mother commenced proceedings in New York contrary to the agreement which had provided that in return for supporting the child until 16 years of age the mother would relinquish all claim against the defendant. Under Illinois law the support agreement was binding whilst pursuant to New York law it was subject to judicial review for fairness. The New York Court of Appeals held that Illinois law governed because, in light of the large number of contacts with Illinois, Illinois was "the 'centre of gravity' of this agreement."²³

A more recent example is Keystone Leasing Corp. v. Peoples Protective Life Ins. Co.²⁴ which was an action to enforce an alleged guarantee agreement. The guarantee provided that New York law governed all disputes between the parties. The defendant contended that Tennessee law applied to the agreement and that the guarantee was unenforceable under Tennessee insurance and corporation law. Applying New York Conflict of Laws rules the court found that the law of Tennessee governed the question of the

²³Ibid at p.69.

²⁴514F. Supp. 841 (1981).

enforceability of the guarantee. "The more modern view ... holds that while the parties' choice of law is to be given considerable weight, the law of the jurisdiction with the 'most significant contacts' is to be applied."²⁵

One well known New York case which applied interest analysis is Intercontinental Planning Ltd. v. Daystrom Inc.²⁶ where the plaintiff sued for a finder's fee on the theory that the parties' written contract had been orally modified. The contract did not state a governing law. The New York Court of Appeals held that the New York Statute of Frauds, which prevented recovery of a finder's fee without a written agreement, rather than a New Jersey statute which would permit recovery, applied to the contract. The court applied interest analysis and stated that

"the interest analysis approach "gives to the place 'having the most interest in the problem" paramount control over the legal issues arising out of a particular factual context ... '[T]he rule which has evolved clearly in our most recent decisions is that the law of the jurisdiction having the greatest interest in the litigation will be applied and that the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict.'"²⁷

²⁵514F. Supp. 841 at pp.847-8 (1981)

²⁶300 N.Y.S. 2d 817 (1969).

²⁷Ibid at pp.825-6.

Criticism of Interest Analysis²⁸

Ehrenzweig has suggested that interest analysis has been rejected by many American states²⁹ and "almost entirely ignored" in both foreign codifications and international conventions.^{30 31}

Interest analysis and in particular the centre of gravity approach is used, together with party autonomy in New York. Detailed criticisms of New York law follow the discussion of that state's law; at this point some general criticisms only are appropriate.

²⁸See generally D. Trautman. Some Notes on the Theory of Choice of Law Clauses. 35 Mercer L.R. 535 (1983-4). L. Brilmayer. Methods & Objectives in the Conflict of Laws. A Challenge. Ibid at p.555. C.D. Allo. Methods & Objectives in the Conflict of Laws: A Response. Ibid at p.565. J.A. Martin. An Approach for the Choice of Law Problem. Ibid at p.583. L. Weinberg. 'On Departing from Forum Law'. Ibid at p.595. R.J. Weintraub. 'Interest Analysis in the Conflict of Laws as an Application of Sound Legal Reasoning. Ibid at p.629. R.A. Sedler. Interest Analysis & Forum Preference in the Conflict of Laws. A Response to the 'New Critics'. 34 Mercer L.R. 593 (1982-1983). F.K. Juenger. Conflict of Laws: A Critique of Interest Analysis. 32 Am. J. of Comp. Law. 1 (Winter 1984).

²⁹A.A. Erhenzweig. Choice of Law in California - A "Prestatement". 21 U.C.L.A. Law Rev. 781 at p.782 (1974). See also H. Goodrich. Handbook on the Conflict of Laws (1964) (4th edit.)

³⁰He cites G. Kegal. The Crisis of Conflict of Laws (1964) 112 Recueil des Cours 93; and The Hague Convention Private International Law, eleventh session, Convention on the Law Applicable to Traffic Accidents - 16 Am. J. Comp. L. 580, 589 (1968), and the twelfth session, Convention on the Law Applicable to Products Liability. 21 Am. J. Comp. L. 136 at p.150 (1973).

³¹See however the E.E.C. Convention on the Law Applicable to Contractual Obligations (1980) and its reference to interest analysis. See infra at p.410 et seq.

Relevance of Policy Considerations to Contract Law ³²

A general criticism of interest analysis is that policy considerations are in general somewhat less relevant in contractual situations. In torts, for example, a state has a considerable interest in the welfare of accident victims; the result of a tortious act can have a far greater effect on a state's resources than any contractual dispute. Contracts, to state the obvious, generally affect the parties to it whilst other areas of the law involve society and its resources. Admittedly there is a world wide trend towards protective legislation which could involve policy considerations but even here it is possible that at an international level such legislature is less likely to be relevant than at a domestic level.³² Large companies who regularly enter into international contracts are more likely to be in equal bargaining positions.³³

Thus the policy considerations that affect contract situations are therefore likely to be at a very general level. One could cite for example the desire for impartiality especially towards out of state litigants as a factor in promoting New York as a commercial centre. However such a general policy consideration cannot be of great relevance if the dispute is, for example, concerned with the communication of acceptance of offers or the interpretation of

³²One would imagine that most protective legislation regulated such matters as Hire Purchase, Door to Door Sales, and Consumer Protection legislation generally. Large international contracts do not usually involve such matters.

³³At the interstate level individual consumers are more likely to be involved and thus perhaps for America and other state systems interest analysis may be advantageous. In

words in a contract.

Difficulties in Applying Interest Analysis

It is suggested that even if one allows that policy may play a part in contract law it is a very difficult task to establish "the shifting sands of policy" in any given case. One doubts if a court would really find assistance from Yntema's seventeen considerations,³⁴ and to resort to "the ordinary process of construction and interpretation"³⁵ is surely of little help to a court faced with an international contract. To determine the policy behind a purely domestic law is a difficult task and at an international level almost impossible. Statutes generally tend to ignore problems raised by foreign elements and this is applicable on both sides of the Atlantic.³⁶

Policy and the reason or reasons behind any given law reflect the country's or state's norms and values. Even if these policies can be found it must be extremely difficult for a court in a truly international contract to make an evaluation. It is also hard to see how Federal courts can develop any criteria for choosing rationally between

New Zealand litigation involves international not inter-state contracts.

³⁴Supra at p.188.

³⁵Currie supra n.31 on p.169 at p.1242.

³⁶Kramer op. cit. supra n.39 on p.170 at p.537.

clashing legitimate state policies in the conflict situations.

Interest analysis properly applied must involve considerable time and expense to administer. The ordinary adversary system cannot fully and adequately inform the court of the scope and extent of the issues involved and as one commentator³⁷ has noted a court has no duty to apply interest analysis until a party requests it to do so, and even if a court undertakes a party-initiated interest analysis it apparently has no duty to consider the interest of states whose laws are not advanced by the litigation.

Reese³⁸ suggests that approaches generally have the defects of uncertainty, unpredictability and are time consuming to apply; they prove an "onerous, difficult and frustrating task" for the judiciary and that "when the policy underlying a statute or decisional rule is otherwise ascertainable, it will often be difficult to refine the policy to the point of being able to determine whether it would or would not be furthered by the rule's application in a case involving foreign facts."⁴⁰

³⁷J.F. Bradley. After Hurtado & Bernard; Interest Analysis and the Search for Consistent Theory for Conflict of Laws Cases. 29 Stan. L.R. 127 at p.141 (1976).

³⁸Reese op. cit. supra n.59 on p.176.

³⁹Ibid at p.317.

⁴⁰Ibid.

A further difficulty in applying interest analysis is the problem of classification. A given fact situation may be a "false" "true" "no interest" or "disinterested forum" case. If it is inappropriate to consider state or national policy in private disputes between two parties then arguably the bulk of cases will fall within the last mentioned category.

Interest Analysis may ignore Party Autonomy

An examination of the governmental interests reflected in the relevant domestic laws concerned reveals nothing to suggest an interest in the parties' intentions about the law to govern. These interests are simply outside the focus of the enquiry.

"Interest analysis necessarily creates confusion and uncertainty in one of the few areas of choice of law in which it was thought that some degree of certainty existed."⁴¹

Thus in Haag v. Barnes⁴², cited above, to ignore the choice of law clauses could lead to uncertainty.⁴³ This is probably the most serious criticism of interest analysis as it applies to contract cases.

⁴¹Trautman op. cit. supra n.25 p.197 at pp.537-8.

⁴²216 N.Y.S. 2d. 65 (1961).

⁴³On the facts however Illinois law applied no matter if interest analysis or the choice of law clause were applied. See however Southern International Sales Co. v. Potter & Brumfield Division of A.M.F. Inc. 410 F. Supp. 1339 (S.D.N.Y.) 1976). See infra at p.296.

As New York has applied governmental interest analysis and the grouping of contacts approach to choice of law problems⁴⁴ it is these two methods in particular that need to be critically evaluated. However it appears preferable to consider the New York case law before undertaking a detailed criticism of these two methods.

New York cases often cite the Restatement (Second) Conflict of Laws 1971⁴⁵ and the New York Uniform Commercial Code in their decisions. It is the former document that is next considered.

⁴⁴See infra at p.270 et seq.

⁴⁵Section 6 discussed infra at p.203 applies criteria suggested by the writers considered above, hence the inclusion of such writers in this chapter.

Chapter II

THE RESTATEMENT (SECOND) CONFLICT OF LAWS
ADOPTED BY THE AMERICAN LAW INSTITUTE IN 1971¹

The general choice of law provision is Section 6 which provides that a court will follow its own state's statutes and that failing any such directive the relevant factors for the choice of law include:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations.
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of results, and
- (g) ease in the determination and application of the law to be applied.²

These considerations may be seen as a modified version of the list of policies set out in the 1952 article by Cheatham and Reese³ and they are similar to and are designed to serve the same purposes as Leflar's⁴ choice influencing considerations. The major differences are firstly the greater number of factors listed in Section 6 and secondly the omission of Leflar's better rule of law consideration.

If emphasis is placed on Section 6 (2) (b) and Section 6 (2) (c) the Restatement (Second) may be seen as supporting

¹Hereinafter cited as the Restatement (Second) Sections 186-188 are set out in Appendix B *infra* at p.561 et seq.

²Section 6 (2).

³See *supra* at p.188.

⁴*Ibid.*

Currie's⁵ view and that of other exponents of interest analysis. Reese⁶ suggests however that whilst Section 6(2)(d) is the "basic" policy consideration it would be wrong to ignore any of the matters listed in Section 6(2).

"To reiterate, a number of different values underlie choice of law. To ignore any one of them is to ignore what the courts have actually done in the past. To be sure, these values will vary somewhat in importance from area to area, and frequently they will point in opposite directions in a single case."⁷

It has been suggested⁸ that Section 6 is merely a "rather loose guide". It has also been termed

"a shopping list of desiderata, all of which are very plausible, except that they conflict with one another."⁹

Juenger¹⁰ points out that Section 6(2)(b) and Section 6(2)(f) conflict and that Section 188 also lists numerous contracts to be considered.¹¹ He concludes that "...even a juggler, not to mention a trial judge, can only cope with a finite number of balls in the air."¹²

⁵Discussed supra at p.168 et seq.

⁶W.L.M. Reese. The Second Restatement of Conflict of Laws Revisited. 34 Mercer L.R. 501 at p.508. (1982-1983).

⁷Ibid.

⁸G.L. Milhollin. The New Law of Choice of Law in the District of Columbia. 24 Catholic Univ. L.R. 448 at p.479 (1975).

⁹F.K. Juenger. The E.E.C. Convention on the Law Applicable to Contractual Obligations: An American Assessment in Contract Conflicts. In Contract Conflicts The E.E.C. Convention on the Law Applicable to Contractual Obligations - a Comparative Study. Ed. P.M. North. at p.300.

¹⁰Ibid.

¹¹Discussed infra at p.211.

¹²Juenger op. cit. supra n.9 at p.300.

It would appear to be a valid criticism of Section 6 and Section 188 that too much is asked of the judge. The contacts listed in Section 188¹³ have to be evaluated in the light of their relative importance to the particular issue presented. "The permutations of any number of issues, six choices of law factors and five contacts, combined with the need to evaluate the contacts in the light of each particular issue, would stymie a computer."¹⁴

Before considering Section 186 it may be noted that the original Restatement of 1934 with its emphasis on vested rights and territorial jurisdiction stated that the *lex loci contractus* determined the validity of international contracts and the *lex loci solutionis* the performance of such contracts.¹⁵ The original Restatement did not acknowledge any power by the parties to choose the applicable law; the Restatement (Second) does.

Section 186 states that "issues in contract are determined by the law chosen by the parties in accordance with the rule of Section 187 and otherwise by the law selected in accordance with the rule of Section 188."¹⁶

Apart from these sections¹⁷ the remaining pertinent

¹³See *infra* at p.211.

¹⁴Juenger *op. cit. supra* n.9 at p.300.

¹⁵See the Introductory Note to Chapter 8 at p.557 of the Restatement (Second) for a brief summary of the 1934 Restatements Contract provisions.

¹⁶For the differences between the two Restatements see J.F. Westbrook. A Survey and Evaluation of Competing Choice of Law Methodologies. A Case for Eclecticism. 40 Missouri L.R. 407 (Summer 1975).

¹⁷Section 6, Section 186, Section 187, and Section 188.

sections emphasise territory.¹⁸

Party Autonomy

Section 187 is the American equivalent of the English law on express choice¹⁹ as the section holds that party autonomy prevails in America and that the parties' choice of law will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement and even if it is one that could not the choice is still applied unless there is no substantial relationship between the chosen state and the parties or transaction and there is no other reasonable basis for the parties' choice. Alternatively the chosen law will not be applied if

¹⁸For example the validity and effect of specified contracts are said to be governed by the law of the state where a particular contract is located. See Sections 189-197. Usually contracts concerning the transfer of interests in land will be governed by the law of the situs, (Section 189) and insurance contracts will be governed by the law of the state where the insured was domiciled at the time the policy was applied for. Section 192. See also Section 302 for contracts involving corporations.

¹⁹ Discussed supra at p.33 et seq.

"application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of Section 188 would be the state of the applicable law in the absence of an effective choice of law by the parties."²⁰

It is clear from the Comment²¹ on the scope of Section 187 that this section includes the situation where the parties have not expressly stated a choice of law clause but where it may be concluded that the parties did wish to have the law of a particular state applied. In other words Section 187 is concerned with both express and inferred choice of law situations. Thus as long as it can be established that the parties have chosen the state of the applicable law the case will be treated as if the parties had actually made an express choice. But in America at least, "[i]t does not suffice to demonstrate that the parties, if they had thought about the matter, would have wished to have the law of a particular state applied."²²

WeightWatchers of Quebec Ltd. v. Weight Watchers International, Inc.²³ illustrates Section 187 in the setting of New York. The case involved alleged breach of franchise

²⁰Restatement (Second) Section 187(1)(b).

²¹Restatement (Second) Section 187 Comment (a) at pp.561-2.

²²Ibid at p.562.

²³398 F. Supp. 1047 (E.D.N.Y. 1975).

agreements which were stated expressly to be governed by New York law. The Federal District Court for the Eastern District of New York gave effect to this choice of law clause saying

"The court will honour a choice-of-law rule consented to by the parties where there is a reasonable basis for the choice or the chosen state has some relation to the agreement."²⁴

Section 187 is then cited.

There are however other limits on party autonomy. For example Comment (b)²⁵ is concerned with the effect of impropriety or mistake on the choice of law and states that whether consent to a choice of law clause is the result of such impropriety or mistake is a matter for the forum to decide in accordance with its own legal principles. Adhesion contracts²⁶ in particular will be scrutinized and the court is to refuse to apply any choice of law provision they may contain if to do so would result in "substantial injustice to the adherent."²⁷

Secondly, unless the contract has significant contacts with two or more states it will be treated as a domestic contract.²⁸

²⁴Ibid at p.1051 n.17 per Judge Neaher.

²⁵Restatement (Second) Comment (b) at p.562.

²⁶Discussed infra at 368.

²⁷Restatement (Second) Section 187 Comment (b) at p.562.

²⁸W.L.M. Reese. Contracts and the Restatement of Conflict of Laws. Second. (1960) 50 at p.52.

Thirdly and more importantly a choice of law provision will be denied effect if there was no reasonable basis for the parties' choice.²⁹

"The forum will not, for example, apply a foreign law which has been chosen by the parties in the spirit of adventure or to provide mental exercise for the judge."³⁰

The Restatement (Second) suggests however that the parties may choose a law that has no connection with their contract so long as such a choice is reasonable.³¹ Thus for example "parties to a contract for the transportation of goods by sea between two countries with relatively under-developed legal systems should be permitted to submit their contract to some well known and highly elaborated commercial law."³²

Whilst this would appear reasonable it has been criticised by such eminent writers as Weintraub who contends that this ability to choose an unrelated law should only be allowed when matters concerning construction are involved and not if validity is in issue.³³

²⁹Restatement (Second) Section 187 (2) (a) and Comment (f) at pp.566-7.

³⁰Ibid at p.567.

³¹Ibid.

³²Ibid.

³³R. Weintraub. Choice of Law in Contract. 54 Iowa L.R. 399 at p.412 (1968).

Two further limitations on party autonomy remain. The parties' choice will be limited to the internal or domestic law of their choice.³⁴ Thus renvoi is not applicable.³⁵

Finally the chosen law will be disregarded if it conflicts with the fundamental policy of the state which would, except for the parties' choice, be the applicable law.³⁶ Reese³⁷ considers this to be the most important exception to party autonomy.

The difficulty is to define what is a "fundamental policy", the Restatement (Second) points out that it must "in any event be a substantial one."³⁸ Reese says it must be "important".³⁹

Section 187(1) will cover most situations as few cases will fall within Section 187(2) because few cases concern issues "which the parties could not have resolved by an explicit provision in their agreement, but as Prebble notes these are the "hard cases".⁴⁰

³⁴Restatement (Second) S.187(3) Comment (h) at p.569.

³⁵Renvoi is discussed infra at p.358 et seq.

³⁶Restatement (Second) S.187 (2) (b). Comment (g) at p.567.

³⁷Reese op. cit. supra n.28 at p.54.

³⁸Restatement (Second) Section 187 (2) Comment (g) at p.568.

³⁹Reese op. cit. supra n.28 at p.54.

⁴⁰E.g. questions relating to capacity, formalities.

Section 188: Cases where the parties have not made a
Choice of Law Decision

The final section requiring discussion is Section 188 of the Restatement (Second) which is concerned with the situation where the parties cannot be said to have made a choice of law decision as regards their contract. Whilst the English and New Zealand courts apply the law which has the closest connection in America the judge applies the law which has the most "significant relationship" to the contract.⁴¹ Section 188 states that the contacts to be taken into account in applying the principles of Section 6 to determine the law applicable to an issue include:

- (a) the place of contracting
- (b) the place of negotiation of the contract.
- (c) the place of performance.
- (d) the location of the subject matter of the contract and
- (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.⁴²

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Finally "if the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied."⁴³

⁴¹Restatement (Second) Section 188 (1). There appears to be no judicial discussion on either side of the Atlantic on the difference between the two phrases. It would seem reasonable to consider that the terms would produce the same results.

⁴²Restatement (Second) Section 188 (2).

⁴³Restatement (Second) Section 188 (3). The section continues by stating that this applies unless otherwise provided in Sections 189-199 and 203.

Criticism of Sections 187 and 188

Both Sections 187 and 188 have received academic criticism. Szold's⁴⁴ writing at the time of the sixth draft of the Restatement (Second) could not see how Section 187 could work in practice and a more recent writer⁴⁵ has agreed that the task imposed on the judiciary by Section 188 is "formidable"⁴⁶ and that despite the "appealing ring"⁴⁷ of the words "the most significant relationship" the concept is complex when related to Section 6. In particular he criticises the use of the word "usually" in Section 188 by pointing out that it could mean virtually anything.⁴⁸

The criticisms levelled at the Restatement (Second) generally, may validly be applied to Sections 187 and 188. Ehrenzweig⁴⁹ suggests the Restatement is too "vague" and Cavers⁵⁰ criticises the Restatement (Second) as being uncertain. In particular he considers that it is unfortunate that no criteria are given for assessing the relative importance of the choice of law principles in any given case.

⁴⁴R. Szold. Comment on Tentative Draft No. 6 of The Restatement (Second) Conflict of Laws.Contracts. 76 Harv. L.R. 1524 (1963).

⁴⁵Juenger op. cit. supra n.9 at p.299.

⁴⁶Ibid.

⁴⁷Ibid.

⁴⁸Ibid at p.300.

⁴⁹A.A. Ehrenzweig. The Second Conflicts Restatement. A Last Appeal for its Withdrawal. 113 Univ. of Pen. L.R. 1230 at p.1232 (1965).

⁵⁰D.F. Cavers. The Choice of Law Process (1965) at p.207 et seq.

Reese⁵¹, the official Reporter, contends that it is impossible to achieve certainty and predictability where there is a contract with contacts equally divided among two or more states. He sees a virtue in the rule which "does not pretend to give certainty and predictability in situations where in the nature of things these values cannot be had."⁵² "The only way of enabling parties to a multi-state contract to know in advance what their rights and liabilities will be is to empower them to choose the state whose law is to govern the contract."⁵³

Weintraub⁵⁴ does not consider Reese's argument here to be a valid one. Commercial convenience is obtained by validating contacts, he says, whenever it is reasonable to do so. He considers Section 187 a partial rule of validation⁵⁵ only and as such is subject to his criticism.

The commentators who have praised the Restatement (Second) are generally those who prefer flexibility to hard and fast rules. Thus Leflar,⁵⁶ for example suggests

⁵¹W.L.M.. Reese. The Second Restatement of Conflict of Laws Revisited. 34 Mercer L.R. 501 at p.515 et seq. (1982-1983).

⁵²Ibid at p.515.

⁵³Ibid.

⁵⁴Weintraub op. cit. supra n.33 at p.408 et seq.

⁵⁵Discussed infra at p.399 et seq.

⁵⁶Leflar made this comment while criticising the torts provisions of the Restatement (Second). See R.A. Leflar. The Torts Provisions of the Restatement (Second) 72 Colum. L. Rev. 267 at p.274 (1972).

that on the whole it is a successful attempt to reconcile the various new approaches to choice of law.

Westbrook⁵⁷ sees the overriding characteristic of the Restatement (Second) as eclectic, and considers this most appropriate in a field in which contradictions and change are inherent.

"Everything considered [it] is the most workable and useful single tool which is currently available to the bench and the bar. It is comprehensive, flexible and eclectic."⁵⁸

What remains uncertain is the extent to which the Restatement (Second) has actually influenced the courts in their decisions and in the way that they have approached conflict of laws problems. There is no way of telling whether the courts have customarily looked to the Restatement (Second) as a guide in reaching their decisions or whether instead the Restatement (Second) is cited in situations which happen to support a result which the court had already decided to reach on some independent basis.

"In the United States it is more an act of faith than a deduction of legal reasoning that leads one to assert that Section 187 (2) of the Restatement (Second) embodies the American rule, or even the majority rule among American jurisdictions."⁵⁹

⁵⁷See Westbrook op. cit. supra n.16 at p.437.
K.H. Nadelmann. Marginal Remarks on the New Trends in American Conflicts Law (1963) 28 Law & Contemp. Probs. 860 at pp.861-2.

⁵⁸Westbrook op. cit. supra n.16 at p.462.

⁵⁹Prebble at p.497.

Be that as it may courts do refer to the Restatement (Second).⁶⁰

The Restatement (Second) may be seen as representing an intermediate position in conflict of laws. At one extreme stands the "objectivist approach" which would give only limited weight to governing law clauses and emphasises the legislative policies of the competing jurisdictions.⁶¹ On this approach one looks at the "most substantial contacts" with the agreement if there is no choice of law clause, and if there is such a clause, then it is only one factor to take into account in determining which jurisdiction bears the most substantial contacts.

At the other extreme is the autonomist position which maintains that parties' choice of law clauses should be honoured and upheld. This it is argued gives effect to the parties' intent.⁶² The autonomists minimise the importance of legislative policies in contractual disputes and reject the need for a relationship between the contract and the chosen jurisdiction. The Restatement (Second) in Sections 187 and 188 tries to achieve a compromise between the two extremes. Party autonomy is recognised but the Restatement also recognises the legislative policies of

⁶⁰E.g. Scientific Holdings Co. v. Plessey Inc. 510 F. 2d 15 at p.22 (2d Cir. 1974), Business Incentives Co. v. Sony Corp. 397 F. Supp. 63 at p.67 (S.D.N.Y. 1975). See *infra* at p.274 et seq.

⁶¹Haag v. Barnes 216 N.Y.S. 2d 65 (1961) discussed *supra* at p. 301 et seq.

⁶²Discussed *infra* at pp.472-3 and see Title 14 New York General Obligations Law Section 5-1401 discussed *infra* at p. 257 et seq.

competing jurisdictions. Under this half way approach a court will apply the law of the jurisdiction bearing the 'most substantial contacts' to the agreement absent a choice of law clause. When the parties have in fact exercised their right to choose a governing law clause a court is to honour the stipulation unless no reasonable relationship exists between the contract and the chosen state or no other 'reasonable basis' exists for the stipulation. Public policy also has a part to play and a court will not enforce a law which has the effect of violating some strong public policy of another interested jurisdiction.

In so far as the Restatement seeks to achieve a balance between two extremes it may be criticised as not going far enough in any one direction. Autonomists would question the reasonable relationship requirement on the one hand and the objectivists would disagree on the emphasis placed on party autonomy. Perhaps a neutral observer would consider its greatest virtue lies in the fact that it does try to bring a little closer together two schools of thought on choice of law.

The next matter to consider is the New York Uniform Commercial Code and its commitment to party autonomy.

Chapter III

THE NEW YORK UNIFORM COMMERCIAL CODE §1-105¹Introduction

The Uniform Commercial Code² is probably the most important single piece of legislation in the United States, and in so far as contract law is concerned it undoubtedly is of enormous significance. It was adopted in New York in 1962.

The idea of promoting uniform legislation throughout America goes back to the 1890's when the National Conference of Commissioners on Uniform State Laws was established for this purpose; however it was not until 1952 that the official Edition of the Uniform Commercial Code with Explanatory Comments was published. William Schnader was the first to propose the idea of a Uniform Commercial Code in 1940 which was at that time considered to be a somewhat novel idea. Henson³ attributes the impetus towards one

¹Section 1-105 is set out in Appendix C infra at pp.563-4.

²See generally W. Schnader. A Short History of the Preparation and Enactment of the Uniform Commercial Code. 22 U Miami L. Rev. 1 (1967) and W.D. Malcolm. The Uniform Commercial Code in the United States. (1967) 12 Int'l & Comp. L.Q. 226. J.F. Burton. The Uniform Commercial Code & Conflict of Laws. 9 Am. J. of Comp. L. 458 (1960).

³R.D. Henson. Secured Transactions Under the Uniform Commercial Code at p.3 et seq. (1979). For an early criticism see J.B. Smith. Conflicts & Chaos or Contract & Uniformity. The Uniform Commercial Code. 2 Univ. of Kansas L. Rev. 11 (1953). Similarly J.F. Beggan & A.A. Kaelin. Notes. Uniform Commercial Code - Commercial Paper Transactions Between Code & Non-Code States: The Problem of Applicable Law. 34 Notre Dame Lawyer 215 at p.223 (1959).

all encompassing Code to a proposal in 1938 by the Merchant Association of New York City for a federal sales act to govern interstate sales.

There has been a series of official texts⁴ since 1952, probably the most important being those of 1962 and 1972. Whilst the Code has been adopted in all states of America it must be noted that the Code has rarely been enacted in complete accord with any official text.⁵ The present discussion is limited to a consideration of the New York Uniform Commercial Code and only Section 1-105 is considered. This is the important conflict of laws section in the Code. It is the general and basic section applicable to all commercial contracts. It applies to the validity of contracts⁶ and whilst other sections in the code provide alternative rules for specific situations it is Section 1-105(1) that is the basic section.

⁴The term "official text" refers to a text approved by the sponsoring organisations and published with their authority. See D.F. Adams. The 1972 Official Text of the Uniform Commercial Code. Analysis of Conflict Problems. 45 Miss.L.J. 281 note 2 (1974).

⁵In 1961 a Permanent Editorial Board was established, the primary function of which was to maintain uniformity in the Code. In Report No. 3 the Board noted the "distressing situation" whereby 337 non uniform amendments had been made to Article 9. A review committee was appointed and their report ultimated in the 1972 official text. Louisiana was the last state to adopt the major provisions of the Code.

⁶R. Weintraub. Choice of Law in Contracts. 54 Iowa L.R. 399 at p.407 (1961).

The New York Uniform Commercial Code contains six sections specifically designed to solve the choice of law problems for commercial contracts or transactions. The basic section is found in Section 1 which establishes three rules.

One rule covers five factual situations and is found in Section 1-105 (2). The law of a particular jurisdiction is to be applied by all states to transactions controlled by Code provisions dealing with rights of creditors against goods sold,⁷ bank deposits and collections,⁸ bulk transfers⁹ investment securities¹⁰ and secured transactions.¹¹ In general these are situations in which a third party is likely to become involved and in which a type of situs law can reasonably be selected as the controlling law.¹²

The second rule allows for party autonomy subject to certain limitations, whilst the final rule concerns transactions where no governing law has been chosen. In this situation the Code of the forum state is applied to transactions bearing an appropriate relationship to the forum state.

⁷Section 2-402.

⁸Section 4-102.

⁹Section 6-102.

¹⁰Section 8-106.

¹¹Sections 9-102 and 9-103.

¹²See generally Adams *op. cit.* supra n.4.

It is the latter two rules which have caused difficulty in their construction and application.

PARTY AUTONOMY

The Uniform Commercial Code of New York¹³ allows for party autonomy in commercial contracts but it is not an unfettered choice that the parties are given. Section 1-105 of the Code applies and despite its apparent simplicity contains a number of possible limitations on the parties' ability to choose a law to govern their contract.

Limitations on Party Autonomy Reasonable Relationship Required

The first limitation is that there must be a reasonable relationship between the transaction and the chosen law. This proviso is found in the first sentence of Section 1-105(1) which states that "except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or such other state or nation shall govern their rights and duties."

In general the test is "similar"¹⁴ to that laid down

¹³In this chapter hereinafter referred to as the Code.

¹⁴U.C.C. Official Comment 1. See Appendix C p.563.

in Seeman v. Philadelphia Warehouse Co.¹⁵ where it was said that the parties must "act in good faith" and that the form of the transaction must not disguise its "real character".¹⁶ The object was to stop parties entering into a contract which had no normal relation to the transaction.¹⁷

¹⁵In Seeman v. Philadelphia Warehouse Co. 274 U.S. 403, 47 S. Ct. 626, 71 L. Ed. 1123 (1927) the plaintiff, a Pennsylvania Corporation having its place of business in Philadelphia, had entered into a loan agreement with a borrower conducting its business in New York. The transaction would have been void as usurious under New York law but was valid under Pennsylvania law. The contract did not contain a choice of law clause but the agreement whilst probably entered into in New York provided for repayment in Pennsylvania. The court held that Pennsylvania law applied under the rule which permits the parties to a contract made in one place and performed in another to contract for the interest rate of either place, whichever is higher.

¹⁶*Ibid.*

¹⁷*Ibid* at p.408.

Normal Relationship

The idea that the relationship must be normal has been considered by a number of writers. Thus Nordstrom and Ramerman¹⁸ conclude for example that unless the transaction has a 'normal' connection with the governing law clause it should not be upheld. Gruson¹⁹ interprets Seeman²⁰ to mean that if the contacts with a jurisdiction do not occur in the normal course of the transaction but were contrived simply to validate the parties' choice of law then the relation will be held to be unreasonable. This introduces the parties' motives and this Gruson argues creates problems. The very object of governing law clauses is to exclude all laws but the one chosen. Contacts with a jurisdiction can easily be manufactured, and parties could be seen as choosing events to occur in a given location in order to validate the choice of law clause. He asks whether the motive of the parties destroys the reasonableness of the relationship between the transaction and the chosen state, even though absent such motive one would conclude that the relation is reasonably related because substantial.

¹⁸R.J. Nordstrom & D.B. Ramerman. The Uniform Commercial Code & The Choice of Law. 3 U.C.C. L.J. 230 at p.235 (1971).

¹⁹Gruson Governing Law Clauses at p.344 et seq.

²⁰Seeman v. Philadelphia Warehouse Co. 274 U.S. 403 47 S. Ct. 626, (1927).

One may argue that it is difficult to determine exactly when a transaction has a normal relation to a jurisdiction. Would, for example, a valid business reason for the occurrence of certain acts in a jurisdiction constitute a normal relationship? Gruson gives the example of a Californian and German Corporation entering into a contract in New York to be performed outside New York. If the place of contracting is fortuitous and simply chosen because of their belief that New York lawyers are the most competent to handle complex transactions then is this normal? Gruson considers the answer to be debatable given that the resulting choice is made because of the parties' opinions rather than resting on any given facts.

It would seem that to substitute 'normal' for 'reasonable' is not particularly helpful.²¹ Whilst the place of contracting or the place of performance is reasonable there appears to be less certainty as to whether the domicile of the parties, the place of shipment, the principal place of business of either party or the situs of the goods would be reasonable. To ask if such matters are normal does not appear to assist the resolution of the problem.

Furthermore Seeman's²² case may be considered an old case decided at a period when mechanical choice of law rules

²¹T.G. Ryan. Reasonable Relation & Party Autonomy Under the Uniform Commercial Code. 63 Marquette L.R. 212 at p.226 (1979).

²²274 U.S. 403 (1927).

applied and secondly the Official Comment²³ does only say the test is similar to rather than identical with that of Seeman.²⁴

Type of contracts necessary to establish a reasonable relationship

Non Geographic Contacts

The Official Comment²⁵ states that ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs. This is no more helpful than the reference to the Seeman decision.²⁶ It may be taken to mean that the contacts necessary to establish a reasonable relationship must have some geographic basis but if the parties are limited by their choice of governing law to the law of the place of making or performance then Section 1-105 would merely represent a revival of Chancellor Kent's teaching which gave the parties a choice between the law of the place of making and the place of performance. However the comment does start with the word "ordinarily" which suggests that the relation could be reasonable because of criteria that lacked a geographic basis. The problem is that no guides are given as to when the general rule is not to apply. In the example given by Gruson above of a Californian and German Corporation making a contract in New York to be performed elsewhere it would seem possible for

²³See Appendix C pp.563-4.

²⁴274 U.S. 403 (1927).

²⁵U.C.C. Official comment 1.

²⁶Seeman v. Philadelphia Warehouse Co. 274 U.S. 403 (1927).

German law to be applied although it was neither the place of making the contract nor the location of its performance. It would be a situation that fell outside the ordinary. In one decision²⁷ the choice was considered reasonable because one of the parties routinely entered into a large number of substantially identical agreements with customers in various states. It had an interest in having those agreements governed by the same law. The only geographic contact between the law chosen and the contract was that the head office of one of the parties was situated in the chosen state.

Whilst it would be impossible to detail all of the factors which, in every case, will constitute a "reasonable relationship" the above sentence in the Official Comment merely seems to substitute "significant" for "reasonable". Nordstrom & Ramerman²⁸ argue that what is meant is that the entire commercial transaction is to be divided into its principal components and that only a portion of either of these components must be significant. They reach this conclusion by emphasising the word "portion". Even if the contact is insignificant when the whole transaction is considered nevertheless measured against the contract's components it could be sufficient under Section 1-105 to justify choosing the law of that state.

²⁷Triangle Underwriters Inc. v. Honeywell, Inc.
457 F. Supp. 765 (1978).

²⁸Nordstrom & Ramerman op. cit. supra n.18 at p.234.

The final sentence in the Official Comment²⁹ states that an agreement as to choice of law may sometimes take effect as a shorthand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen. Ryan³⁰ suggests that this passage simply means that "an analysis founded on geographic contacts alone is incomplete, and the failure to locate a geographic contact does not automatically invalidate the parties' choice."

Pounds³¹ contends that the sentence appears to do away with the reasonable relation requirement and should therefore be evoked sparingly. He suggests that it is relevant when the contract bears a reasonable relation to the forum but not to the jurisdiction chosen by the governing law.

Geographic Contacts

The Official Comment³² specifically refers to the place

²⁹U.C.C. Official Comment 1. See Appendix C p.563.

³⁰Ryan op. cit. supra n.21 at p.227.

³¹T.W. Pounds. Party Autonomy - Past and Present. 12 S. Texas L.J. 214 at p.227 (1970).

³²Uniform Commercial Code. Official Comment 1. See Appendix C p.563.

of performance³³ as a relevant geographic contact.

In the 1950's when the goal was to apply the Uniform Commercial Code wherever possible Judge Goodrich considered that any contact that triggered application of the Code would also confer upon the parties' choice the requisite reasonable relationship.³⁴ Thus the making, offering or acceptance of the contract would suffice and as noted above the Official Code Comment would validate the parties' choice if a "significant enough portion of the making" of the contract occurs within the chosen jurisdiction.

³³It has been suggested that the strength of the place of performance contact could prove an obstacle to the validation of the parties' choice in certain circumstances. In I.S. Joseph Company Inc. v. Toufic Aris & Fils 388 N.Y.S. 2d. 1 (1976) a New York court considered the validity of a contractual provision which provided that disputes under an agreement would be arbitrated in New York - under its laws. The appellant suggested that the laws of Louisiana should govern the matter as that was the state where performance was to take place. The court treated the argument seriously. The contention was finally rejected because the court concluded that the issue concerned that portion of the contract calling for arbitration (rather than the portion calling for performance). As arbitration related to the law of remedies and as "the law that governs remedies is the law of the forum" New York law applied. The court went on to hold that the parties' choice of law would be upheld pursuant to Section 1-105(1). The court may have gone to such lengths to uphold the choice of New York law precisely because of the strength of the place of performance contacts with the case. It is clear that the court was concerned with the lack of New York contacts and in a rather conclusory way stated that "at least as to the provision for arbitration, the transaction bears a reasonable relation to New York." Ibid at p.3.

³⁴H. Goodrich. Conflict Niceties & Commercial Necessities. Wisc L.R. 199 at p.207 (1952).

When one turns to other possible contacts that could constitute a reasonable relationship between the governing law clause and the jurisdiction the cases and commentators are less conclusive. The tendency is however to consider geographic contacts.³⁵

Nordstrom & Ramerman³⁶ contend that if the choice of law clause has no reasonable relationship to the forum the clause should be upheld despite the code being "inartfully" drafted. They reason that the forum will have no interest in the outcome of the dispute, and that if there is no reasonable relationship between the choice of law clause and the forum then the forum is only providing the venue for the action. It should therefore endeavour to fulfil the policy of the Code which is to uphold party autonomy.

Application of the Reasonable Relationship

A trilogy of cases may be cited to illustrate the New York courts' attitude towards the reasonable relationship requirement.³⁷

³⁵Ryan for example in this context discusses the situs of the property or goods, the principal place of business, the place of incorporation and the place from or through which goods are shipped as contacts. Ryan op. cit. supra n.21 at p.232 et seq.

³⁶Nordstrom & Ramerman op. cit. supra n.18 at p.234.

³⁷Associated Metals & Mineral Corp. v. Sharon Steel. 590 F. Supp. 18 (S.D.N.Y. 1983) and L. Orlik Ltd. v. Helme Products Inc. 427 F. Supp. 771 (D.C.N.Y. 1977) have been chosen because they feature in the Notes of Decisions in the Update to the Uniform Commercial Code from the McKinney Supplement. The third case, Fleischmann Distilling Corp. v. Distillers Co. Ltd. 395 F. Suppl. 221 (D.C.N.Y. 1975) is included because it is discussed in Orlik's case, supra and has been much quoted.

Fleischmann Distilling Corp. v. Distillers Co. Ltd.³⁸

involved contracts for the distribution of whisky. The court held that

"The canon in New York which controls the disposition of this issue ... is that the intent of the parties shall govern as to the choice of law regarding their contract, provided that intent can be discovered and that the state chosen bears a reasonable relationship to the agreement."³⁹

After citing judicial authority for this the court refers to both the Restatement (Second) of Conflict of Laws Section 187 (2) 1971 and the Uniform Commercial Code Section 1-105 (1). Carter J.⁴⁰ continued by noting that the agreements expressly provided that they were to be governed by the law of England and then applied the reasonable relation test. What appears to be significant is the way in which he applies the requirement. He said the test was met and he found this to be so by adding up the contacts with England. The contracts were executed in the United Kingdom, the defendants were incorporated there and performance and payment and title to the goods passed in the United Kingdom.

This approach of finding the contacts and listing them leads to the conclusion that it is to a party's advantage to gather together as many geographic contacts as possible.

³⁸395 F. Supp. 221 (D.C.N.Y. 1975).

³⁹Ibid at p.229.

⁴⁰Ibid.

No attempt is made to evaluate the contacts.

In L. Orlik Ltd. v. Helme Products Inc.⁴¹ the choice of law clause also stipulated English law to govern the sale of briar pipes. The court found a reasonable relationship between the transaction and England by simply stating two geographical contacts.⁴² The whole choice of law issue was dispatched very briefly. This case is a typical example of the application of the reasonable relationship test and illustrates the fact that the courts' approach is robust. If a choice of law clause exists then not a lot of time and energy is put into considering the reasonableness or otherwise of the choice.

The third case in this trilogy is Associated Metals & Minerals Corp. v. Sharon Steel⁴³ and is cited here because again it is typical of the courts' approach in New York. As noted above it is also cited in the notes of Decisions which makes it a decision of greater significance. The United States District Court first stated the facts of the case which were undisputed. The litigation involved two contracts for the purchase and sale of steel slabs. Both orders contained a choice of law provision stating that they were to be governed by the law of Pennsylvania, and both indicated that the steel slabs were to be delivered F.O.B. in Pennsylvania. The material was to be used by Sharon at its Pennsylvania premises. All the steel was

⁴¹427 F. Supp. 771 (D.C.N.Y. 1977).

⁴²One party was English and the pipes were sold to the other party (American) in England.

⁴³590 F. Supp. 18 (S.D.N.Y. 1983).

delivered and accepted, however Sharon was late in some payments although the total purchase price was eventually paid. Association Metals & Minerals Corporation had acquired the steel from Norway and brought the action seeking damages in the form of interest on Sharon's late payments. The contracts contained no provision for interest on late payment but provided payment to be made within 15 days of delivery.

Having stated these facts the court proceeded to discuss the choice of law issue in a manner typical of so many decisions. Erie Railroad Co. v. Tompkins⁴⁴ is cited as authority for the fact that state law governs the substantive aspects of actions in diversity in the Federal Courts and Klaxon Co.⁴⁵ is cited as authority for the proposition that in order to determine which state's law is to be applied the federal court must look to the choice of law rule of the forum state. Thus Motley J. arrives at the conclusion that the court must therefore look to the choice of law rules of the State of New York to determine the governing law of this action.

Next comes a much stated sentence namely, "New York courts will honor a choice of law provision in a sales contract as long as the transaction bears a 'reasonable relationship' to the state whose law is chosen."⁴⁶

⁴⁴304 U.S. 64 (1938).

⁴⁵Klaxon Co. v. Stentor Electric Manufacturing Co. 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941).

⁴⁶590 F. Supp. 18 at p.20 (S.D.N.Y. 1983).

The Code⁴⁷ and Fleischmann⁴⁸ are cited before the reasonable relation test is considered. All the court says is "The purchase orders indicate that the steel slabs were to be delivered F.O.B. in Pennsylvania. It is also undisputed that the material was to be used by Sharon at its Farrell, Pennsylvania facility. The court concludes that the transaction bears a reasonable relationship to Pennsylvania. Hence it is to Pennsylvania law that the court must turn in considering the instant motions."⁴⁹

A straightforward and common fact situation is followed by what might be considered as an arbitrary application of a reasonable relation test. The court gives no reasons why delivery and the fact that the steel is to be used in Pennsylvania should be sufficient to satisfy the test. It is not clear in the judgment where the contracts were made and no reference is made to the fact that the plaintiff is a New York corporation. Two geographic contacts are deemed sufficient to establish the reasonable relationship.

The similarity with Orlik⁵⁰ is apparent. The only discussion of the reasonable relationship in that case was contained in one sentence. Given the existence of a choice of law clause specifying English law as the applicable law the matter was settled; "the question since the defendants' purchase in England of the plaintiff's briar

⁴⁷U.C.C. §1-105(1).

⁴⁸Fleischmann Distilling Corp. v. Distillers Co. Ltd. 395 F. Supp. 221 at p.229 (S.D.N.Y. 1975).

⁴⁹590 F. Supp. 18 at p.20 (S.D.N.Y. 1983).

⁵⁰Orlik Ltd. v. Helme Products Ltd. 427 F. Supp. 771 (S.D.N.Y. 1977).

pipes provides a reasonable relation between this transaction and England, thus validating the clause under New York law."⁵¹

The conclusion is that the tendency is to choose geographic contacts and obviously the place of making the contract and the place of performance are important contacts. There is a trend to find the reasonable relationship test satisfied and the cases do not indicate that the court considers the weight of the contacts. This is despite references to the Restatement which requires evaluation of the closer contacts.⁵²

A Reasonable Relationship to the Forum

On a literal reading of the section the transaction in question must bear a reasonable relation to both the forum and another state or nation. Thus New York courts should be obliged to establish a reasonable relationship with New York as well as with another jurisdiction. The cases illustrate that this is not in fact done. The courts imply a relationship with the forum and find the requirement satisfied rather than find the section inapplicable.

⁵¹Ibid at p.774. Numerous other examples could be given. In Bache & Co. v. International Controls Corp. 339 F. Supp. 341 (S.D.N.Y. 1972) for example a list of geographic contacts is given, no reasons are stated why other geographic contacts are ignored.

⁵²See supra at p.203 et seq.

Sharon's case⁵³ illustrates this point. The only contact with New York was the fact that the plaintiff was a New York corporation.⁵⁴ Instead of citing the whole of the first sentence of Section 1-105 the New York District Court said "New York courts will honour a choice of law provision in a sales contract as long as the transaction bears a 'reasonable relationship' to the state whose law is chosen."⁵⁵ No mention is made of the contacts with New York; it is assumed or implied in the judgment that New York and the transaction were reasonably related. By only stating half of the test the court naturally only went on to apply that half of the test.

This case is typical of other cases;⁵⁶ given the existence of a choice of law clause the court does not expend time and energy finding a reasonable relationship between the choice and New York.

This would appear to be an eminently sensible attitude to adopt given the existence of a choice of law clause.

⁵³Associated Metals & Minerals Corp. v. Sharon 590 F. Supp. 18 (S.D.N.Y. 1983).

⁵⁴It is not clear that the steel slabs ever saw New York; they appear to have gone directly from Norway to Pennsylvania.

⁵⁵*Ibid* at p.20.

⁵⁶Another example in County Asphalt Inc. v. Lewis Welding & Engineering Corp. 323 F. Supp. 1300 (S.D.N.Y. 1970) where Ohio law was applied and the relationship with New York assumed.

A Partial Relationship

One problem in Section 1-105 (1) is whether a reasonable relation to a chosen state could exist as to only some aspect of a transaction, and if so whether the choice of law clause would be valid for this aspect only.

Adams⁵⁷ and Henson⁵⁸ have suggested that this is so, however Gruson⁵⁹ and Goodrich⁶⁰ disagree. Goodrich considers that it is the purpose of Section 1-105 to apply the stipulated law to the whole of a transaction, even if only one aspect of the transaction needs the reasonable relation requirement. Gruson points out that the language in Section 1-105 would suggest that Goodrich's views are correct. He notes that the word 'the' is used before the word 'transaction' in both the section and in the Official Comment 1.

Adams⁶¹ considers it quite possible that a stipulation of the parties that the law of a particular state is to govern their contract would be given effect only in part, because the forum court concludes that there is a reasonable relation to the chosen state as to some aspects of the transaction but not to others.

⁵⁷Adams op. cit. supra n.4 at p.317.

⁵⁸Henson op. cit. supra n.3 at p.209.

⁵⁹Gruson Governing Law Clauses at p.350.

⁶⁰Goodrich op. cit. supra n.34 at pp.201-2.

⁶¹Adams op. cit. supra n.4 at p.317.

Henson⁶² takes a similar view and cites Associated Discount Corp. v. Cary⁶³ in this context. The case involved a sailor who in the course of his peripatetic life had his car repossessed. When not at sea he seemed to be constantly moving from place to place and thus the case involved a number of states. There was no express choice of law clause but the court applied Section 1-105(2) and Section 9-103. The latter section deals with multiple state transactions and provides that when property already subject to a security interest, as the sailor's car was, is brought into a state the validity of that interest is determined by the law of the jurisdiction where the security interest attaches. Thus a rule applies to one aspect of the contract and presumably the parties in Cary could have chosen a law to govern some other aspect of their contract and thus Henson's argument applies.⁶⁴

Note on Number of States Involved

One interpretation not considered by courts or commentators is that, again on a literal reading of the first

⁶²Henson op. cit. supra n.3 at p.319.

⁶³262 N.Y.S. 2d. 646 (N.Y.Civ. Ct. 1965).

⁶⁴Cary's case is also another example of the forum assuming a reasonable relation to it by the contract.

sentence of Section 1-105(1) it does not apply to transactions having contacts with three or more states. Strictly interpreted there must be a reasonable relationship to the forum and another state or nation. However given the policy of the Code it is unlikely that a court would take this restrictive interpretation of the section. Thus the Code will apply if there is a reasonable relationship with three or more jurisdictions.

Conclusion to the Reasonable Relationship Requirement

1. The Courts' Attitude: The aim of the Code is to create certainty⁶⁵ in the field of commercial law. Unless the courts tend to find a reasonable relationship established in the vast majority of cases then the parties are going to be left in a state of uncertainty with regard to the effectiveness of their choice of law clause. It is suggested that the New York court's attitude in tending to assume a reasonable relationship encourages party autonomy and the use of governing law clauses and thus avoids uncertainty which the Code was designed to eliminate. The courts practical and robust approach may therefore be praised.

2. Difficulties in applying the test: However the test can be difficult to apply. There are no clear guides laid down as to what constitutes a reasonable relationship. The temptation is to place the emphasis on geographical

⁶⁵See Section 1-102(2) of the Code; read as a whole certainty may be said to be a goal. See generally J.M. Finnerty. The Uniform Commercial Code. 29 Albany L. Rev. 1 (1965).

contacts. Ryan takes this view. He considers that the preoccupation with geography is neither mandated by the Code nor called for under conflict of laws principles, and that an "exclusively geographic analysis of the 'reasonable relation' criteria improperly restricts party autonomy under Section 1-105."

Ryan suggests that what the courts have done is to search for geographic contacts and then the characteristic response is to lump them together before ranking them in an order. It is clear in Ryan's view that the greater number of contacts the parties can amass the more assured they will be that their choice will be upheld, (subject to the principle of good faith bargaining.)⁶⁶ His views would seem to be correct.

3. Difficulty in predicting results: The lack of guidance as to the choice of contacts and the weight to be afforded to each contact necessary to establish the reasonable relation test, together with the court's tendency to consider the cases on an ad hoc basis means that each case is of little use as a precedent for future cases. However by taking the attitude they do, the judges of New York do foster party autonomy which must always be the first goal to consider.

Perhaps the problems posed by Section 1-105(1) could be said to be few from a practical point of view, otherwise a greater body of case law would have emerged by now. If

⁶⁶Ryan op. cit. supra n.21.

one takes this view then possibly Denonn is correct. He states in the Practice Commentary prefacing the Official Comments that what is a reasonable relation "should not be too difficult to determine from the facts. It should not be an adventitious relationship but one that bears upon the facts involved in the transaction itself."

Turning from the reasonable relationship requirement the next matter to consider is the necessity for "agreement".

The Necessity for Agreement

The second major limitation on party autonomy in the Uniform Commercial Code is also found in Section 1-105(1). The Code states that the parties may agree as to the law which will govern their rights and duties. 'Agree' is not defined but 'agreement' is, and obviously the two words must be interpreted similarly. 'Agreement' is defined as "the bargain of the parties in fact".

It is the duty of the court to determine whether or not the parties have agreed. One code section which can be used here is Section 1-103 which states that

"Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principle and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy or other validating or invalidating cause shall supplement its provisions."

Similarly for sales transactions Section 2-302 relating to unconscionability can also be used to test the enforceability of a choice of law clause. This section gives the court the power to refuse to enforce any clause

found to be unconscionable. Such a finding could apply where there was no true agreement by the parties or perhaps where the law chosen had no normal connection with the transaction.

In Paragon Homes, Inc. v. Carter⁶⁷ the court held unconscionable a clause by which the parties agreed to submit to the jurisdiction of a New York court. Paragon Homes, a Maine corporation, had contracted with the defendants who lived in Massachusetts to carry out improvements to their house in that city. The court considered that the object of specifying a New York court was to harrass and embarrass the defendants who were not in an equal bargaining position. Whilst no choice of law clause is involved the case does illustrate the court's attitude towards unconscionability.

Nordstrom & Ramerman⁶⁸ argue that 'agree' could mean more than the usual express choice of law clause; they suggest that 'agree' can be given an expanded meaning to include agreement by implication. They point out that agreement is defined to include the bargain of the parties as found in their language "or by implication from other circumstances",⁶⁹ and they suggest that if all the contacts of a transaction are with one jurisdiction and if the parties are or should have been familiar with that law then by implication the parties agree on that law as the applicable law. These two writers suggest that this wider inter-

⁶⁷288 N.Y.S. 2d. 817 (Sup. Ct. 1968).

⁶⁸Nordstrom & Ramerman op. cit. supra n.18 at p.239.

⁶⁹Uniform Commercial Code Section 1-201(3).

pretation of the word 'agree' is not inconsistent with the language or policy of the Code and is supported by case law.⁷⁰

If one takes the view that businessmen do not choose laws that are strange to them⁷¹ then this requirement that the parties must 'agree' is probably the greatest limitation on party autonomy in the Code. Although it is argued in this thesis that party autonomy should be as unfettered as possible some limitation is obviously necessary.

There must always be a general escape device to enable the judge to strike down a choice of law clause that has been included in a contract as a result of unequal bargaining power, duress or overreaching. To use the term 'agree' would appear to be a sound general term to employ in this situation.⁷²

The Position of Third Parties

Another limitation on party autonomy in the Uniform Commercial Code is that in general no third party should be bound by a choice of law clause. Most third parties will fit into one of the exceptions listed in Section 1-105(2) although these sections may not be exhaustive. Section 2-402 contains another exception. Situs law is to be used to determine the rights of creditors of a seller

⁷⁰Nordstrom & Ramerman op. cit. supra n.18 at p.239 footnote 29.

⁷¹and thus risk having their choice attacked as not reasonably related.

⁷²The exceptions to party autonomy are discussed infra at p.310 et seq.

who has retained possession of sold goods. This limitation may be seen as a result of the wording of Section 1-105(1) itself as the section does read "The parties" may agree as to the system of law to govern "their" rights and duties.⁷³

Meaning of "Transaction"

Another problem concerns the meaning of the word 'transaction'. It could apply to every step taken by either party in the course of the performance of the contract⁷⁴ or it could have the same meaning as the term 'contract.' Thirdly it has been suggested by Rheinstein⁷⁵ that the word 'transaction' may have a broader meaning in so far as it could refer to the total chain of business activities of which a particular contract is a part.

If the first interpretation above is correct then the question becomes does the Uniform Commercial Code apply only to the transaction in question or to the contractual relation as a whole? In the former case different aspects of the same contractual relation may have to be judged by different laws which may conflict with each other; in the latter case it could be that the Code would be applied

⁷³In Industrial Packaging Products Co. v. Fort Pitt Packaging Int'l Ltd. 339 Pa. 643 at p.647 for example the Supreme Court of Pennsylvania has stated that a clause providing that New York law was to govern bound the parties but did not affect the rights of the parties' creditors. "Otherwise it would be possible for two parties to render nugatory as to third parties an Act of Assembly passed for the benefit of such third parties."

⁷⁴M. Rheinstein. Conflict of Laws in the Uniform Commercial Code. (Winter 1951) 16 Law & Contemp. Probs. 114 at p.127.

⁷⁵Ibid.

to a contractual relation which may have only slight contact with the forum.

If 'transaction' has the third meaning given above then Rheinstein⁷⁶ considers a "particularly undesirable" result could eventuate as "it might make the application of the lex fori to a contract for sale dependent upon factors which may be totally unrelated to that particular contract."⁷⁷

It is suggested that the courts would take a practical view here as has been done with the reasonable relationship requirement. There is no reason why the word 'transaction' should not be synonymous with the word 'contract'. The Code's aim is to simplify the law concerning contracts. Ease of application must have been seen as desirable; to give strained meanings to the word 'transaction' does not help matters. No cases appear to have considered the meaning of the word 'transaction' which suggests that the difficulties here are more academic than real.

A Note on Public Policy

One limitation which courts should not put on choice of law clauses is that the public policies of the forum are not to be overridden by the application of foreign law. All commentators⁷⁸ put this interpretation on the Code,

⁷⁶Ibid.

⁷⁷Ibid.

⁷⁸Nordstrom & Ramerman op. cit. supra n.18 at at p.241. Prebble at p.534 and see infra at p.333.

generally stating that as the Code is so widely accepted within the United States and as it deals with commercial matters it is not likely that variations will reflect some fundamental policy or "some deep-rooted tradition of the common weal."⁷⁹

Thus the cases do not consider public policy and a choice of law valid by Section 1-105(1) is in effect unreviewable on public policy grounds.⁸⁰

Conclusion: Party Autonomy and the Code

Party autonomy dominates in the New York Uniform Commercial Code. The courts' attitude to the reasonable relationship requirement keeps the exception in proportion. Other matters discussed above, such as the meaning of the word 'transaction' are probably of academic interest only, for otherwise the matter would have been litigated from time to time during the last twenty-five years.

As the rule is the result of legislation it is easy to find. Lawyers are not required to hunt through a mass

⁷⁹Loucks v. Standard Oil Co. 224 N.Y. 99 at p.111 (1918).

⁸⁰In Nederlandse, etc. v. Grand Pre-Stressed Corp. 466 F. Supp. 846 (E.D.N.Y. 1979) the court made the statement that "It is an established principle of New York law that the parties to a contract may consent, in the absence of a strong countervailing public policy, to the law to be applied with respect to the contract." U.C.C. S.1-105 (McKinney). However public policy was not an issue in the case and the court went on to apply the Uniform Commercial Code to the breach of contract.

of case law to find the party autonomy rule as is the case in other jurisdictions.

New York would appear to have adopted the most sensible and practical solution to the choice of law issue for contracts with contacts in more than one jurisdiction. New Zealand should likewise adopt such an approach.

NO EXPRESS CHOICE

The Appropriate Relationship Test

The next matter that requires discussion is the application of Section 1-105 to those cases where the parties have failed to stipulate a law to govern their transaction. If the parties have not made an express choice then pursuant to the second sentence of Section 1-105(1) the Uniform Commercial Code of the forum applies to the transaction if it bears an "appropriate relationship" to the forum State, and that in the present context is New York.⁸¹

The Official Comment 2⁸² makes the point that the mere fact that the action is brought in a state does not make it appropriate to apply the substantive law of that state. An example is given of what would not be appropriate. If the law of the place of contracting and the law of the place of contemplated performance are the same and are contrary to the law under the Code then it would not be appropriate to apply the Uniform Commercial Code.

The Official Comment 3 leaves the question of appropriate relationship to judicial decisions and states that in deciding that question the court is not strictly bound by precedents established in other contexts.

On a literal interpretation the statement that the Code "applies to transactions bearing an appropriate re-

⁸¹For a history of the Appropriate Relationship Test see R.J. Nordstrom & D.B. Ramerman. The Uniform Commercial Code & the Choice of Law. 4 Duke L. Rev. 623 at p.635 et seq. (1969).

⁸²See Appendix C. pp.563-4.

lation to this state" means that the lex fori is going to be applied irrespective of the number and strength of contacts with other states so long as an appropriate relation exists with the forum.

It has been pointed out⁸³ that what amounts to 'appropriate' can change with time. A relation which was appropriate when the problem was whether to apply a newly drafted comprehensive Code or the law of a non Code state does not necessarily continue to be appropriate when all states involved have the same basic legislation.

The Official Comment⁸⁴ gives cases where a relation to the enacting state is not appropriate to include, for example, those cases where the parties have clearly contracted on the basis of some other law, as where the law of the place of contracting and the law of the place of contemplated performance are the same and are contrary to the law under the Code.

Two cases may serve as illustrations of the test.

Application of the Appropriate Relationship Test

Windsor Industries, Inc. v. Eaca Intern. Ltd.⁸⁵ provides a clear example of the application of the appropriate relation requirement. There was no choice of law clause. The plaintiff, a New York Corporation brought an action against two corporations which were organised under the

⁸³Nordstrom & Ramerman op. cit. supra n.81 at p.641.

⁸⁴See Appendix C pp.16 and 17.

⁸⁵548 F. Supp. (E.D.N.Y. 1982).

laws of the Crown Colony of Hong Kong for alleged breach of warranties by the defendants in their sale of electronic television games to Windsor.

The plaintiff relied on Section 1-105(1) and argued that New York law should govern since delivery was made in New York and it was understood that the games were to be resold and distributed through the plaintiff's facilities in that state. The court found however that the "facts of the transactions" did not support the application of New York law. Next follows a list of contacts which the court presumably considered pertinent. First negotiations for the transactions occurred in Hong Kong, second the plaintiff's orders for the games were accepted there, thirdly the games were delivered to the plaintiff's agents in Hong Kong and were accepted there after inspection and shipped F.O.B. Hong Kong aboard carriers he designated, and finally payment was made to the seller by means of irrevocable letters of credit established in Hong Kong.

No attempt is made to evaluate these different contacts nor is it stated why they should have been chosen in preference to other possible contacts such as the plaintiff's place of incorporation and business. The court having listed the geographically orientated contacts simply concluded that the appropriate law was that of Hong Kong.

In Hughes v. Marine Midland Bank⁸⁶ Dr. Hughes stopped a cheque which had been given by his wife to a real estate

⁸⁶484 N.Y.S.2d 1000 (City Ct. 1985).

agent for a month's rent for accommodation in Florida. The doctor gave the wrong cheque number but otherwise identified the cheque he wanted stopped. The bank subsequently paid out the full amount.

The court noted the contacts with New York - Dr. and Mrs. Hughes were New York residents, the bank owned and operated a branch bank in the jurisdiction and the banking contract between the parties was made in that state. Finally the debtor-creditor relationship it created was to be performed in Rochester, New York.

New York law governed and Section 1-105(1) and Auten v. Auten are cited as authority, and the court went on to hold the bank liable, much to Mrs. Hughes' relief.

The Problem of Determining When the Appropriate Relationship test Applies

Gruson⁸⁷ suggests that the New York lex fori also applies if the parties have chosen a jurisdiction other than the forum which does not bear a reasonable relation to the transaction.

Adams⁸⁸ takes a similar view. Henson⁸⁹ however does not consider that Section 1-105(1) governs the case where parties choose the law of a state to govern whose relation to the transaction is not reasonable.

The Code says "Failing such agreement this Act applies to transactions bearing an appropriate relation to this state".

⁸⁷Gruson Governing Law Clauses at p.350.

⁸⁸Adams op. cit. supra n.4 at p.285.

⁸⁹Henson op.cit. supra n.3 at pp.209-10.

One could argue both interpretations. If the sentence means "If the first part of Section 1-105(1) cannot be satisfied for whatever reason then the appropriate relationship applies" one would favour Gruson's and Adams' view. Alternatively if the words mean exactly what they say and no more, i.e. that the relationship applies if there has been no agreement, then the other limitations, including the reasoning relationship, still apply.

Whilst on the one hand it could be said Gruson and Adams are reading more into the section than is there the object of the Code was to make for uniformity. It was intended to apply to as many contracts as possible. This aim is furthered by applying Gruson's and Adams' interpretation.

The matter does not appear to have been judicially considered. From a practical point of view either interpretation results in the ultimate application of the lex fori. Pursuant to Gruson and Adams views New York law will apply so long as there is an appropriate relation to New York; it does not matter if the transaction fails on the reasonable relationship requirement in the first half of Section 1-105(1). If Henson is correct then having failed on the reasonable relationship test the last sentence of Section 1-105(1) is inapplicable therefore New York as the forum must fall back on its common law conflict of laws provisions. The actual result applying either the Code or this common law is however likely to

be the same.⁹⁰

Finally in this context one may consider what the cases have actually done. On the one hand it has been suggested that this matter has not been judicially considered; on the other hand the cases can be interpreted as supporting either view.

In one case⁹¹ it was found that New York had no reasonable relationship to the transaction.⁹²

⁹⁰See Restatement (Second) Conflict of Laws s.187. The New York Annotations suggest that the Official Comment 3 means that the Code adopts the significant contacts test, which is the New York common law position anyway. In Martin v. Julius Dierck Equipment Co. 384 N.Y.S. 2d 479 (1976), Titone J. in the Appellate Division of the Supreme Court said it was the court's opinion that the framers of the Uniform Commercial Code "were not of a mind to follow blindly the traditional conflict of laws theory with respect to contracts and the related laws of warranty, to wit, that the place of making or performing the contract is controlling as to the governing law." Ibid at p.483. The court considered that the language of Section 1-105 showed this and that the Official Comment thereto was indicative of legislative approval of the "most significant relationship" test of the Restatement (Second). The court accordingly applied the 'grouping of contacts or centre of gravity' doctrine to the facts.

⁹¹Duplan Corp. v. W.B. Davis Hosiery Mills Inc. 442 F. Supp. 86 (S.D.N.Y. 1977).

⁹²The governing law clause specified a choice of New York law. All the "truly significant" contacts were held to be with North Carolina. Prebble at p.533 considers that a "bizarre" situation could arise here. He says that if forum law was chosen and failed on the reasonable relation test then the Code would still apply if the transaction bore an appropriate relation to the forum. He therefore considers it "conceivable" that a court might strike down an express choice of forum law as not being reasonably related to the contract, but nevertheless apply that same law as "appropriately" related. However he concludes that "appropriate" and "reasonable" in this context would have the same meaning.

The court applied Auten v. Auten⁹³ (the significant contacts test) without referring to the second sentence of Section 1-105(1). This is explicable on two grounds.

First of all it may be argued that the judge was applying the appropriate relation test but had failed to articulate his reasoning process. On this view the appropriate relationship test is the significant contacts test of Auten.⁹⁴ The judge may be seen as jumping ahead in applying the test before explaining how he arrived at this test.

Alternatively it may be seen as a situation where the Code does not apply. The reasonable relationship requirement is not satisfied and it is not a situation falling within the second sentence because there has been no "failing such agreement". The parties had chosen New York law to apply. Therefore once the first part of Section 1-105(1) is found to be inapplicable the court goes straight to its common law conflict of laws provisions.

The Duplan decision⁹⁵ does not help Gruson and Adams because the second sentence of Section 1-105(1) is arguably not being applied. Henson's view can be seen as correct if one argues that the court has gone straight to the common law from the first sentence of Section 1-105(1).

⁹³124 N.E. 2d. 99 (1954).

⁹⁴As suggested by the U.C.C. Official Comment 3 and as interpreted by the New York Annotations.

⁹⁵Duplan Corp. v. W.B. Davis Hosiery Mills Inc. 442 F. Suppl. 86 (S.D.N.Y. 1977).

However it can be argued that the court arrived at the significant contacts test via the appropriate relation test.

The matter of whose view is correct remains to be solved by judicial decision. The only fact in favour of arguing that the courts do reach the significant contacts test via the appropriate relationship test is that cases exist which fall squarely within the second sentence of Section 1-105(1) which have not mentioned the appropriate relationship requirement at all. For example in Bache Co. v. International Controls Corp.⁹⁶ there was no governing law clause. Having noted this fact the court said "therefore one must look to the 'centre of gravity' of the 'grouping of contacts theory' of conflict of laws."⁹⁷ Auten⁹⁸ is cited⁹⁹ and the contacts with New York stated. No mention is made of the appropriate relation test. Here the court is faced with a situation on all fours with the second sentence of Section 1-105(1) and yet it is not mentioned. This suggests that the court is applying the test but not articulating its reasoning process.

As the matter has not arisen to date it could be argued that the whole problem is of academic making. In Bache

⁹⁶339 F. Supp. 341 (1972).

⁹⁷Ibid at p.347.

⁹⁸Auten v. Auten 124 N.E. 2d. 99 (1954).

⁹⁹339 F. Supp. 341 at p.348 (1972).

for example the court did not mention the reasonable relationship requirement presumably because there was no governing law clause anyway.

Conclusion

If the first sentence of Section 1-105(1) is not applied for any reason then the court is likely to apply the significant contacts test. From a practical point of view whether the court reaches its decision via the appropriate relationship test or by simply applying common law is probably immaterial. From a technical point of view it is suggested that the two sentences are not related in any way. Either there is a choice of law clause in which case the reasonable requirement qualification applies, or if there is no choice of law clause then one starts afresh by considering the second sentence of Section 1-105(1).

Conclusions to Section 1-105(1)

The Uniform Commercial Code is probably the most important piece of business legislation ever prepared in the United States.¹⁰⁰ Because it is designed to have the force of law and control the major part of interstate mercantile and financing transactions it is more important than the American Restatement (Second) which is a non-

¹⁰⁰Some American writers would say the world. See F.K. Beutel. The Proposed Uniform Commercial Code as a Problem in Codification. (Winter 1951) 16 Law & Contemp. Probs. 141.

official statement of what the law is thought to be. The Uniform Commercial Code has been adopted in all states and the resulting uniformity should avoid a great many of the choice of law problems which confronted pre-Code lawyers and judges. Regrettably however the widespread acceptance of the Code has not completely eliminated the need for choice of law rules in commercial transactions. This is because the Code has not been adopted outside the United States and within America most states have altered various sections to reflect some local policy. Moreover courts have and no doubt will continue to interpret the same Code sections differently.¹

The conclusion is that even though commercial transactions are regulated in the United States, international contracts and even transactions between Code states will continue to generate choice of law problems.

The Code has its critics. These critics tend to focus on the disadvantages generally of forum-oriented rules. "Blanket insistence on application of the law of the American forum is likely to impress our foreign trading partners as unwarranted parochialism" is a typical criticism.²

However as a clear pronouncement in favour of party autonomy the Section must be considered of great value.

The weakness of Section 1-105(1) lies in the vague

¹For example see Nordstrom & Ramerman op. cit. supra n.81 at p.624 footnote 2.

²Weintraub op. cit. supra n.6 at p.418. He was considering the appropriate relationship test.

test given for establishing the applicable law absent a choice of law clause. A test which is easier to apply and which would introduce certainty into the area is required.

This would seem a reasonable conclusion given the object of the Code and its intention to simplify interstate commercial contracts.

A further conclusion is that by ultimately applying the significant contacts test the uniform Commercial Code and New York common law will apply the same test for both commercial and non commercial contracts. This must be seen as advantageous.

SECTION 5-1401 OF THE NEW YORK GENERAL OBLIGATIONS LAW³

Defined

This section which became effective in New York on 19 July 1984 provides as follows:

"Choice of law. 1. The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred and fifty thousand dollars, including a transaction otherwise covered by subsection one of section 1-105 of the Uniform Commercial Code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relationship to this state. This section shall not apply to any contract, agreement or undertaking (a) for labour or personal service, (b) relating to any transaction for personal, family or household services, or (c) to the extent provided to the contrary in subsection two of Section 1-105 of the Uniform Commercial Code.

2. Nothing contained in this section shall be construed to limit or deny the enforcement of any provision respecting choice of law in any other contract, agreement or undertaking."⁴

In 1983 the Committee on Foreign and Comparative Law of the Association of the Bar of the City of New York had made a Proposal for Mandatory Enforcement of Governing-Law Clauses and Related Clauses in Significant Commercial Agreements.⁵

The Proposal was intended to apply to large commercial transactions where New York had been chosen because of its leading role as an international commercial centre. The Proposal resulted in Section 5-1401.

³This section is sometimes referred to as Title 14.

⁴New York General Obligations Law S.5-1401 (1984 N.Y. Laws Ch. 421) (McKinney 1986 Supp.)

⁵See The Record of the Association of the Bar of the City of New York. Vol. 38 No. 6 537 (1983).

Section 5-1401 is a clear legislative attempt to support and uphold party autonomy. The Committee had suggested a minimum monetary requirement of one hundred thousand dollars which would result in only really large non consumer transactions being involved. Furthermore these requirements would reduce the likelihood that any party had agreed to a governing law clause through fraud, mistake, overreaching or unequal bargaining power. The Committee⁶ also noted that parties to a sizeable commercial transaction will probably have been represented by counsel during the negotiation process. These factors, it was suggested, guaranteed as far as possible, that the parties had carefully considered the consequences of their choice of New York law. It also ensures that the public policy concern to protect personal family, agricultural or consumer transactions would not be impaired when liberalizing the law applied to larger commercial transactions.⁷

Paragraph 2 of Section 5-1401 expressly states that a choice of law clause in contracts not covered by the statute are not deemed to be ineffective. Such choice of law clauses will be determined by New York conflict of laws principles and, where applicable, Section 1-105 of the

⁶Ibid at p.543.

⁷G.A. Penn & T.W.Cashel. Choice of Law Clauses in Commercial Agreements Under New York and English Law. (1985) J. Bus. Law 501.

Uniform Commercial Code.

A number of matters resulting from Section 5-1401 need to be noted.

1. The Monetary Limitation

First the monetary limitation adopted was significantly higher than the recommended figure, and whilst expressed in terms of United States dollars the New York courts will apply the equivalent in foreign currency in determining this threshold requirement.⁸ To choose a monetary limit may be said to involve an arbitrary cut off point which would have been better avoided. In times of rapid inflation it will be necessary, presumably, to continually alter this figure to ensure that only really large contracts are covered. Alternatively, of course, if the figure is left at two hundred and fifty thousand dollars Section 5-1401 will apply to an increasing number of cases as the value of money decreases.

It is difficult to see why the need was felt for a monetary limit at all given that the parties are going to be in equal bargaining positions. The contracts that are excluded by Section 5-1401(1)(a), (b) and (c) include those contracts where the parties are in unequal bargaining positions. Penn & Cashel⁹ suggest that a threshold of size indicates the contract is important and

⁸This is clear from the legislative history of Section 5-1401. See McKenney's Session Laws of New York 1984 Vol2 at p.3288.

⁹Penn & Cashel op. cit. supra n.7 at p.501.

that legal advice has been obtained, thus by implication the parties realise the significance of their choice of law clause. If parties are in equal bargaining positions and if they chose New York law to govern then they should be bound with their choice even though New York has no relationship to the contract other than the choice of law clause. The monetary hurdle required by the section may be seen as indicative of the section's general character which is cautious and limited.

2. Dépeçage¹⁰ is allowed

The second matter to note is that contractual dépeçage is expressly recognised by Title 14.

3. Scope of Section

Thirdly the scope of the section is a little unclear. Obviously only commercial contracts are contemplated but there will inevitably be borderline cases arising which could exhibit characteristics belonging to both commercial ventures and to types of contracts enumerated in Section 5-1401. The statute is remedial and therefore should be interpreted liberally but it is easy to see difficulties arising.

It has been suggested¹¹ that although the words used are "the parties to any contract" the legislature intended

¹⁰This simply means that parties may subject part of their contract to one law and another part to another law. The matter is discussed below. See *infra* at p.379-80.

¹¹S.M. Cone. A Note. 111 Int'l Fin. L. Rev. 38 (Sept. 1984).

that wherever litigants were properly before a New York court, whether by virtue of the new Act or otherwise, the court should view the Act as embodying a mandatory enforcement rule of general application which would cover both the parties to the contract and any third party for whose benefit the contract was entered into. New York's liberal third party beneficiary doctrine is cited in support of this contention.

4. The effective date

Fourthly the section came into effect on July 19, 1984. This means that the provisions of the statute apply to contracts entered into after that date and also to contracts entered into on or before the effective date in connection with any action or proceeding commenced on or after the effective date of July 19 1984.¹²

5. Jurisdiction - A Note

Finally as a related matter is the question of jurisdiction. The Committee¹³ in 1983 were aware of the fact that English law was frequently preferred to New York law for international transactions because English law is not said to require a relationship between the transaction and England, and English courts do not dismiss on the basis of forum non conveniens if the parties to the litigation are foreigners.¹⁴ Hence the need existed to make New York equally

¹² Penn & Cashel op. cit. supra n.7 at p.502.

¹³Record of the Association of the Bar of the City of New York op. cit. supra n.5 at p.544.

¹⁴Ibid.

attractive to international parties. Consequently the legislation has three basic principles. First is the principle of party autonomy, secondly where parties agree on the application of New York law the courts should have jurisdiction to hear the case and the third principle is that the defence of forum non conveniens should not be invoked by a party to such a contract who has agreed in the contract to New York law and has agreed to submit to New York jurisdiction.

Title 14 Section 5-1402 is the jurisdiction section accompanying Section 5-1401. If parties to a contract of at least one million United States dollars stipulate New York law under Section 5-1401 they may also avail themselves of New York courts under Section 5-1402. Section 5-1402 allows the parties to contracts stipulating New York law pursuant to Section 5-1401 to consent to New York in personam jurisdiction. When the parties consent to jurisdiction, the statute prohibits New York courts from dismissing the case on the grounds of inconvenient forum.¹⁵ ¹⁶

6. The Effect of the Full Faith and Credit Clause of the United States Constitution

Finally a question has been raised as to the extent to which the full faith and credit clause of the United

¹⁵N.Y. Civ. Prac. R. 327(b) (McKinney Supp. 1984-85) Rule 327(b) was enacted as part of Assembly Bill 7307-A. 1984 N.Y. Law Ch. 421. Rule 327(b) provides that the courts shall not stay or dismiss an action on the grounds of inconvenient forum when Section 5-1401 and Section 5-1402 apply.

¹⁶Section 5-1402 also removes prior restrictions on the rights of foreign corporations and banks to sue in New York if Section 5-1401 and 5-1402 apply.

States Constitution ¹⁷ may affect the operation of the New York statute. The full faith and credit clause operates in the federal system to provide for recognition in one state of the public acts and judgments of another sister state. The question is whether Section 5-140 can constitutionally be applied in a case where a New York forum is required by the section to apply New York law absent a reasonable relationship with New York and where a fundamental policy of another interested state is involved.

As has been pointed out¹⁸ the problem does not arise in international contracts as the clause does not operate outside the United States federal system. Where the contract is interstate future cases will have to determine whether New York has a sufficient state interest by virtue of its status as a pre-eminent financial centre, as the place of the chosen law and forum, and in promoting certainty in commercial contracts under New York law to outweigh the governmental interest of another sister state.

It has been suggested that an exception should be added to 5-1401 to read "Nothing in this section or in Section 5-1402 shall be construed to permit contracting parties to stipulate New York law to circumvent the public policies of other interested states."¹⁹

¹⁷U.S. Const. Art. IV Section 1.

¹⁸Penn & Cashel op. cit. supra n.7 at p.503.

¹⁹B.W. Rashkover. Title 14, New York Choice of Law Rule for Contractual Disputes: Avoiding the Unreasonable Results. 71 Cornell L.R. 227 at p.247 (1985).

One writer²⁰ takes the view that as Section 5-1401 explicitly directs the court to apply New York law even if there is strong public policy of another interested jurisdiction, the full faith and credit clause is definitely violated. The statutory language and legislative intent of Title 14 specifically direct the courts to enforce governing law clauses in all cases covered by the statute. If this proviso were to be adopted then its author considers Title 14 would still forward the important conflict of law value of party autonomy , and will also forward another important conflict of law value which is recognition of significant legislative policies of interested other state jurisdictions. The full faith and credit clause would not be overridden.

Criticisms of Section 5-1401

Some criticisms of Section 5-1401 have already been canvassed. The suitability of a monetary requirement²¹ the scope of the section,²² and its effect on the Full Faith and Credit clause of the United States Constitution²³ have already been considered.

Three further criticisms may be noted.

²⁰Ibid.

²¹Supra at pp.295-6.

²²Supra at pp.262-3.

²³Supra at pp.262-3.

1. The object of Section 5-1401 might not be achieved

It was intended that Section 5-1401 would promote New York's role as a leading commercial centre. It has been argued²⁴ that this object might not be achieved. Rashkover argues that this section does nothing to actually encourage commerce in New York state. Contracts for the production of goods or for the construction of facilities generate employment at the site of production and the positive economic effect of such employment benefits that state's economy. New York's stature as a commercial centre will not be fostered by Title 14 because parties may "bestow the significant fruit"²⁵ of their activity in other states while reaping the benefits of New York's well developed commercial law. Under the reasonable relationship test the parties had an incentive to maintain some actual contact with New York; now they need only include a governing law clause in their contract.

2. Certainty may not result

Rashkover²⁶ also suggests that Title 14 does not achieve certainty. Whilst a New York choice of law clause will provide certainty in New York there is nothing to stop another party from bringing an action in another state. Other states do not have a Title 14 but apply the reasonable

²⁴Rashkover op. cit. supra n.19 at p.241 et seq.

²⁵Ibid.

²⁶Ibid.

relationship test or interest analysis. A non New York forum will not uphold the choice of New York law on either of these approaches if there is no connection with New York. So parties can never be sure that their clause will be effective.

3. Impact of Section 5-1401 Limited

Thirdly it may be suggested that the Section will have little impact in New York because it will apply to very few cases. A number of cases will have been discussed in the New York context.²⁷ Had the Code come into effect the day Auten²⁸ was decided only two of the cases discussed in the text would have met the requirements needed to bring Section 5-1401 into operation. The first decision is Keystone Leasing v. Peoples Protective Life Ins.²⁹ and even here it is not altogether clear from the judgment that the monetary requirement is met. No figures are given although there is a statement to the effect that "loans amounting to a quarter million dollars might be sought".³⁰ Assuming the monetary requirement is met then the case is on all four squares with Section 5-1401. It will be recalled that the New York governing law clause was not upheld. However the judge noted that the result would be the same

²⁷I.e. the U.C.C. cases supra at p.217 et seq. and the New York common law cases infra at p.270 et seq.

²⁸Auten v. Auten 124 N.E. 2d 99 (1954). Auten is the earliest decision considered in this part of the thesis.

²⁹514 F. Supp. 841.

³⁰Ibid at p.845.

whether Tennessee law or New York applied. Keystone would be unsuccessful³¹ whether party autonomy, the significant contacts test or Section 5-1401 applied. The new section has no impact on the decision.

Bank Itec N.V. v. J. Henry Schroeder Bank & Trust³² a case yet to be discussed satisfied the requirements of Section 5-1401. Six million dollars was involved and there was a New York governing law clause. Again the section has no impact on the decision, New York law was upheld anyway.

It seems, therefore, that Section 5-1401 is perhaps too cautious and limited, and that it should have been framed in terms that would have meant that it applied to a greater number of decisions.

Conclusions

Despite these disadvantages the removal of the reasonable relation test can only be seen as advantageous.³³ However the New York legal system is faced with a dilemma. On the one hand is the desire to promote New York's role as an international commercial centre and on the other is the fear that if no restriction is placed upon party autonomy then the New York State and Federal courts will become completely inundated with minor disputes. In New York

³¹Keystone's conduct was such that no law would be likely to allow Keystone to profit from its actions.

³²612 F. Supp. 134 (D.C.N.Y. 1985).

³³Discussed in detail below. See *infra* at p.289 et seq.

the courts are already overloaded,³⁴ and the ever increasing number of cases suggests that in New York some limitation is necessary. Whether a monetary limitation is the answer is, however, debatable.

Overall however Section 5-1401 with its clear pronouncement in favour of party autonomy must be seen as a tool to promote certainty within the law in New York.

The object of passing this legislation was to ensure the effectiveness of choice of law clause in large commercial transactions.³⁵ Section 5-1401 should ensure that this is achieved.

The monetary limitation, or any limitation that endeavoured to limit the use of the courts' time is not an argument that is applicable to New Zealand. Geographically isolated and not a world-centre any legislation that adopted party autonomy in New Zealand would not result in an overwhelming mass of cases coming before our courts.

³⁴See generally R.A. Posner. The Federal Courts. Crisis and Reform. (1985)

³⁵The Record of the Association of the Bar of the City of New York op. cit. supra n.5 at p.538.

Chapter IV

THE NEW YORK COMMON LAW RELATING TO
INTERSTATE AND INTERNATIONAL CONTRACTS

Introduction

The discussion on governmental interest analysis and the Restatement (Second) Conflict of Laws serve as a general introduction to New York Law.

The New York Uniform Commercial Code will apply to many interstate and international contracts. However when the Code is not relevant and when Section 5-1401 does not apply, New York common law will prevail. It is this body of law which is next considered. The case law in this area is diverse, however a review of the decisions suggests a number of propositions: The first consideration is that party autonomy prevails in New York.

1. Party Autonomy supported by Case Law

Since the 1950's it is possible to cite numerous cases in support of party autonomy in New York.¹ A recent illustration is found in Bank Itec N.V. v. J. Henry Schroeder Bank & Trust² a decision of the United States District Court.

¹E.g. Siegelman v. Cunard White Star 221 F. 2d. 189 (2d. Cir. 1955), Reger v National Association of Bedding Manufacturers Group Insurance Trust Fund 372 N.Y.S. 2d. 97 (Sup. Ct. Westchester County 1975), Sears, Roebuck & Co. v. Enco Associates Inc. 401 N.Y.S. 2d. 767, and see the cases cited by Gruson. M. Gruson. Governing Law Clauses in International Loan Agreements - New York Approach. Univ. of Illinois L.R. 207 at p.211 et seq. (Winter 1982) (hereinafter referred to as Gruson New York Approach).

²612 F. Supp. 134 (S.D.N.Y. 1985).

Goettel J. held that not only does the Restatement and the substantial weight of case law support party autonomy but "fundamental policies underlying contract law also counsel its adoption."³ The protection of justified expectations is seen as the prime objective of contract law. The court considered that this was best attained in multi state transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way certainty and predictability of results would be most likely to be secured. Finally the judge noted that giving the parties power to nominate the governing law is also consistent with the fact that, in contrast to other areas of law, persons are free within broad limits to determine the nature of their contractual obligations.⁴

The cases which support party autonomy also suggest that a reasonable relationship requirement is necessary.⁵ Since 1964 the New York Uniform Commercial Code Section 1-105(1) has required for commercial contracts a reasonable relation requirement⁶ to be placed on party autonomy. However cases exist which suggest that this was required in

³Ibid at p.141.

⁴The case arose out of a complicated multi-party transaction involving a Dutch bank, a New York bank and a Florida insurance company. The governing law clause stated New York law was to govern the agreement in question. The choice of law clause was upheld.

⁵Gruson. New York Approach at p.211 et seq. cites the cases.

⁶Supra at p. 228 et seq.

New York prior to the enactment of the Uniform Commercial Code. For example in S.A. Rampell Inc. v. Hyster⁷ the New York Court of Appeals upheld a choice of law clause "since the parties intended it to be applicable and it [the agreement] had a reasonable relation to it."⁸

2. Non Exclusive Use of Party Autonomy in New York

A number of decisions exist which suggest that party autonomy is not omnipotent in New York. For example in Haag v. Barnes⁹ Fuld J. said¹⁰

"The traditional view was that the law governing a contract is to be determined by the intention of the parties the more modern view is that 'the courts instead of treating as conclusive the parties' intention or the place of making or performance,' lay emphasis rather upon the law of the place 'which has the most significant contacts with the matter in dispute.'"¹¹

This case is important as it was a decision of the New York Court of Appeals and it was the first case to hold that the significant contacts test could be applied where a choice of law clause had been made.¹²

⁷165 N.Y.S. 2d. 475 (1957).

⁸Ibid at p.486.

⁹175 N.E. 2d 441.

¹⁰Ibid at p.443.

¹¹Auten v. Auten 124 N.E. 2d. 99 (1954) and one other case, Rubin v. Irving Trust Co. 305 N.Y. 288 (1935) are cited as authority.

¹²In Auten v. Auten 724 N.E. 2d. 99 (1954) there was no governing law clause.

This approach was followed in La Beach v. Beatrice Foods¹³, a decision of the United States Southern District Court. The case involved what may be considered to be a truly international contract with 'contacts' in America, Europe and Africa.

Werker J. held that following Haag v. Barnes although the parties' choice of law clause is to be given 'considerable weight' the law with the most significant contacts is to be applied. The law applied was Illinois law as that state had the most significant contacts.

Similarly in Keystone Leasing v. Peoples Protective Life Ins.¹⁴ the United States Court for the Eastern District of New York refused to give effect to a choice of law clause specifying that New York was to govern the contract. Costantino J. stated that

"The more modern view, however, holds that while the parties' choice of law is to be given considerable weight, the law of the jurisdiction with the 'most significant contacts' is to be applied."¹⁵

Without giving reasons the court decided that the most significant contacts were with Tennessee and that fundamental policies of that state as reflected in its insurance and corporation laws were involved, and that the applicable Tennessee statutes did not violate the public policy of New York.¹⁶ The case provides a clear

¹³461 F. Supp. 152 (1978).

¹⁴514 F. Supp. 841 (1981).

¹⁵Ibid at p.847.

¹⁶The issue in the case relevant to choice of law concerned the enforceability of a guarantee which had specified that New York law was to govern any dispute.

example of a court preferring "the most significant contacts" test to that of party autonomy.¹⁷

Similarly in Southern International Sales Co. v. Potter & Brumfield Division of A.M.F. Inc.¹⁸ the United States Court for the Southern District of New York refused to uphold a choice of law clause specifying Indianan law to govern. The Court relied on the public policy exception in Section 187 of the Restatement (Second) Conflict of Laws and interest analysis to reach its conclusion. The Court noted that its decision did not fulfil the parties' expectations but concluded that state interests and state regulations overruled the parties' choice. The applicable law, absent the choice of law clause would have been the law of Puerto Rico, also the application of Indianan law would frustrate the fundamental policy expressed in the Puerto Rican Dealers' Contracts Act.

The Court thus made a clear decision to ignore the parties' choice in favour of another law.

In 1975 the United States District Court formulated the New York approach somewhat differently. Party autonomy would be upheld provided there were sufficient contacts and the application of that state's law would not be contrary to any fundamental policy of a state which had a materially greater interest than the chosen state in the determination of the particular issue at bar, and which

¹⁷However in this case the court thought it unlikely that the actual result would have differed under Tennessee or New York law. See p.847 of the Judgment.

¹⁸410 F. Supp. 1339 (S.D.N.Y. 1976).

would be the state of the applicable law in the absence of an effective choice of law by the parties. This test was stated in Business Incentives Co. Inc. v. Sony Corp. of America.¹⁹ Only the Restatement (Second) Section 187 is cited in support of this alleged test. No other cases are discussed on this issue. The test was applied and the New York governing law clause was not upheld. The contacts were found to be predominantly with New Jersey and so that law would apply absent the choice of law clause. New Jersey was also seen as having a strong public policy in protecting the weaker party in a contract.

Some Academic Views

It may be argued that party autonomy exists in New York, is limited by a reasonable relationship requirement, or other requirements,²⁰ or alternatively that the significant contacts test applies. Cases illustrate all these findings. Since the 1950's academic writers have held equally diverse views. Levin²¹ and Batiffol²² writing in the 1950's considered that governing law

¹⁹397 F. Supp. 68 (1975)

²⁰See Business Incentives Co. Inc. v. Sony Corp. of America 397 F. Supp. 68 (1975).

²¹M.J. Levin. Party Autonomy. Choice of Law Clauses in Commercial Contracts. 46 Geo. L.J. 260 at p.261 (1957-1958).

²²H. Batiffol. Public Policy and the Autonomy of the Parties. Interrelations Between Imperative Legislation and the Doctrine of Party Autonomy. In Lectures on the Conflict of Laws and International Contracts. U. Mich. Law School Summer Inst. on Int'l & Comp. Law (edit. 1951) at p.68

clauses were not decisive in themselves. Batiffol²³ considered an express choice of law clause as an 'indication' only of the law to be applied.

In the next decade it was Graveson's²⁴ opinion that Gerli's²⁵ case was preferable to Siegelman's.²⁶

Schliesser²⁷ in the mid sixties said there was "growing opposition" to party autonomy. Johnston²⁸ agreed and Leflar²⁹ in the second volume of his Treatise noted that whilst governing law clauses will be helpful they might not be respected. Lowe³⁰ was to make the same point in the next decade.

Recently at least one commentator has stated that "New York does not follow the autonomy rule."³¹

²³Ibid at p.78.

²⁴R.H. Graveson. Comparative Evolution of the Principles of Conflict of Laws in England and the U.S.A. (1960) 9 Recueil des Cours 21 at p.98.

²⁵Gerli & Co. v. Cunard Steamship Co. 48F. 2d. 115 (2d. Cir. 1931). Gerli's case had held that "some law must impose the obligation, the parties have nothing whatever to do with that; no more than whether their acts are torts or crimes." 48F. 2d. 115 at p.117 (2d. Cir. 1931).

²⁶Siegelman v. Cunard White Star Ltd. 221 F.2d. 189 (2d. Cir. 1955).

²⁷P.C.O. Schliesser. International Sales Agreements. 10 Prac. Law 45 at p.49 (Jan. 1964).

²⁸R. Johnston. Party Autonomy in Contracts Specifying Foreign Law. 7 Wm. & Mary L. Rev. 37 at p.160 (1966).

²⁹R.A. Leflar. American Conflicts Law (1968) (2nd. edit.) at p.366.

³⁰J.R. Lowe. Choice of Law Clauses in International Contracts. A Practical Approach. 12 Harv. Int'l L.J. 1, at p.32 (1971).

³¹R.J. Bauerfeld. Effectiveness of Choice of Law

Other writers take an opposite view.³² One recent commentator³³ for example emphasises the existence of party autonomy in New York and Gruson³⁴ in the last decade considers party autonomy is part of New York law.

Summary

The most unbiased conclusion to draw is that party autonomy prevails in New York subject to a requirement that the choice of law be reasonably related to the contract. This is the basic common law rule which applies to interstate and international contracts in the absence of specific legislative provisions.

New York Cases which Involve No Choice of Law Clauses

It seems clear that since the 1950's New York courts have consistently applied the significant contacts test to determine choice of law issues where the parties have failed to make an express choice themselves.

Auten v. Auten³⁵ was the first case to apply the significant contacts test. It has been so frequently followed that it may be considered a landmark decision. Fuld J.

clauses in Contract Conflict of Law. Party Autonomy or Objective Determination. 82 Colum. L. Rev. 1659 at p.1669 (1982).

³²G.A. Penn. Choice of Law Clauses in Commercial Agreements under New York and English Law. (1985). J. Bus. Law 250. Gruson Governing Law Clauses at p.329 et seq. T. Brown. Notes. Choice of law Stipulations by Litigants. 43 Washington & Lee L.R. 141 at p.141 (Winter 1986).

³³Penn *ibid*.

³⁴Gruson Governing Law Clauses at p.329 et. seq.

³⁵124 N.E. 2d. 99 (1954).

states the traditional rule, namely that the *lex loci contractus* and the *lex loci solutionis* were means of solving choice of law problems and notes that "many cases appear to treat these rules as conclusive. Others consider controlling the intention of the parties and treat the general rules merely as presumptions or guideposts, to be considered along with all other circumstances."³⁶ He then notes that courts have also applied the 'centre of gravity' or the 'grouping of contacts' theory. The New York Court of Appeals went on to apply this test to the facts and found that all the contacts of the case were with England. English law was thus applied.

The next decade saw Auten being applied by the New York courts in a number of decisions. For example in Oakley v. National Western Life Insurance Co.³⁷ the court stated the Auten rule and considered it "clear"³⁸ that New York courts would apply the law of the state which has the most significant contacts with the matter in dispute.³⁹

Motley J. then admits however that "it is less clear how this is done."⁴⁰ He cites the Restatement (Second) and states that "the rights and duties of the parties with respect to an issue in contract are determined by the local

³⁶Ibid at p.101.

³⁷294 F. Supp. 504 (S.D.N.Y. 1968).

³⁸Ibid at p.506.

³⁹Ibid.

⁴⁰Ibid.

law of the state which as to that issue, has the most significant relationship to the transaction and the parties."

"New York courts have delineated the methodology to be employed in this procedure. First ... isolate the issue, next ... identify the policies embraced in the laws in conflict, and finally ... determine the contacts of the respective jurisdictions to ascertain which has a superior connection with the occurrence and thus would have a superior interest in having its policy or law applied."⁴¹

Motley J. continues by saying that it appears that in New York the most significant contacts to be evaluated are the relative interests of the states involved.⁴² Four significant contracts are listed.⁴³ The fact that New York had an interest in protecting its citizens who pay premiums in or from New York coupled with the fact that New York's interest infringed on no interests of Missouri meant that New York was to apply.

Intercontinental Planning v. Daystrom⁴⁴ which was cited to illustrate interest analysis in Chapter 1 of this part of the thesis⁴⁵ also states that Auten⁴⁶ is the rule

⁴¹Ibid at p.501.

⁴²Ibid.

⁴³(1) Both plaintiff and decedent were, at the times relevant to this action, New York domiciliaries.
 (2) Decedent paid premiums on this policy and did so by mailing them from New York to Missouri.
 (3) The policy was issued in Missouri.
 (4) The policy was issued by a Missouri Corporation to its parent, a Delaware Corporation doing business in Missouri.

⁴⁴300 N.Y.S. 2d. 817 (1969).

⁴⁵Supra at p.196.

⁴⁶Auten v. Auten 124 N.E. 2d. 99 at p.102 (1954).
 Quoted by Jason J. 300 N.Y.S. 2d. 817 at p.825. (1969).

in New York. Jason J. noted that the traditional view had been rejected by the New York Court of Appeals, and a direct quote from Auten v. Auten is given with approval.

The approach adopted

"gives to the place 'having the most interest in the problem paramount control over the particular factual context, thus allowing the forum to apply the policy of the jurisdiction' most intimately concerned with the outcome ... "

Having directly quoted Fuld J. in Auten Jason J. continued by stating

"The rule which has evolved clearly in our most recent decisions is that the law of the jurisdiction having the greatest interest in the litigation will be applied and that the facts or contacts which obtain significance in defining state interests are those which relate to the purpose of the particular law in conflict." ⁴⁷

The Court held that the New York Statute of Frauds applied, this legislation prevented recovery of a finder's fee without a written agreement. The Court considered that New York had an interest in protecting foreign principals doing business in New York. The plaintiff, a New York broker, could thus not recover his fee.⁴⁸ If the law of New Jersey had been applied the legitimate interests of New York would have been defeated without any corresponding legitimate interests of another state being furthered.

⁴⁷Ibid.

⁴⁸The other party was a New Jersey company. In New Jersey the New York broker could have recovered his fee.

This decision has been applied in a number of other decisions.⁴⁹ It can be taken as authority for interest analysis or the centre of gravity theory.⁵⁰

New York Common Law and the New York Uniform Commercial Code Section 1-105(1). A Note

The New York common law obviously applies to all non-commercial contracts.

If the contract is of a commercial nature then the Code may apply. However it must be remembered that Section 1-105(1) is not always applicable. It is not "a rule which allows the parties to choose the 'law' to apply to their 'transaction' whether or not such transaction is covered by the Uniform Commercial Code."⁵¹ It will only apply in the situations posed by Section 1-105(1) itself. Thus if the parties have not made a choice of law decision

⁴⁹Pallavicini v. International Telephone & Telegraph Corp 341 N.Y.S. 2d. 281 (1973).
J. Zeevi & Sons Ltd. v. Grindlays Bank (Uganda) Ltd. 371 N.Y.S. 2d. 892 (1975).
Index Fund Inc. v. Insurance Co. of North America 580 F. 2d. 1158 (1978).
 See also: Joy v. Heidrick & Struggles Inc. 403 N.Y.S. 2d. 613 (N.Y. Civ. Ct. 1971) and
Krauss v. Manhattan Life Ins. Co. 643 F.2d 98 (2d. Cir. 1981) for examples of interest analysis.

⁵⁰Cf. Southern Intern. Sales v. Potter & Brumfield Div. 410 Supp. 1339 at p.1342 (1976) where the court said "whether one applies the 'most significant relation' test expressed in Section 188 and in Auten v. Auten or the more recent government interest analysis of International Planning Ltd. v. Daystrom Inc. ..." thus suggesting the two approaches are quite distinct. It is argued that this is not so. Daystrom was applying Auten.

⁵¹Gruson Governing Law Clauses at p.343.

and if the transaction does not bear an appropriate relation to New York then the New York common law will apply. The connection between the Code and common law is closer when one takes into account the fact that it is the common law which is partially involved in establishing the 'appropriate' relationship requirement.⁵² The matter is left to judicial decisions thus common law decisions are used to interpret the phrase.

At the end of the day the ultimate outcome in a particular case is likely to be the same whether the Code or common law applies. If a choice of law clause exists then the choice must be reasonably related both for the Code and for the common law. If no choice of law clause exists then the Code applies if the transaction is appropriately related. The cases⁵³ list contacts or in other words apply the significant contacts test to determine this matter. Thus the significant contacts test is in effect applied to cases coming within the Code and cases being decided pursuant to the common law.

New York Common Law and the Restatement (Second)
Conflict of Laws: A Note.

Assuming that New York common law allows for party autonomy so long as a reasonable relationship exists between the law chosen and the contract and that failing express choice the significant contacts test applies then it may be stated that

⁵²See supra at p.246 et seq.

⁵³See e.g. Windsor Industries Inc. v. Eaca Intern. Ltd. 548 F. Supp. (E.D.N.Y. 1982) and Hughes v. Marine Midland Bank N.A. 484 N.Y.S. 2d. 1000 (City Ct. 1985) both discussed in the context of the Uniform Commercial Code supra at p.247 et seq.

the Restatement does basically state New York law.⁵⁴

Some minor differences may be noted. Section 187 (2)(a) introduces the term "substantial relationship", for example, but party autonomy is the rule with the significant contacts test applying in the absence of choice. The Restatement (Second) is cited with approval in many New York decisions.⁵⁵

New York law and English law. A Note

It has been suggested⁵⁶ that the real difference between America and England on their choice of law rule is, at the end of the day, a matter of evidence. In America one must show that the chosen law is substantially (or in the case of New York reasonably) connected with the contract. This is usually self evident but in a difficult case the party relying on the clause must prove a substantial or reasonable relationship. In England the inference is in the opposite direction. Where the chosen law does not have any particular connection with the contract the burden will be on the person attacking the choice to show that it was legally objectionable. Prebble cites Mount Albert Borough Council v. Australian Temperance & General Mutual Life Assurance Society Ltd⁵⁷ and in re Helbert Waggs.

⁵⁴For a more detailed discussion see Gruson Governing law clauses at p.340.

⁵⁵See for example the cases cited by Gruson ibid especially in footnote 49.

⁵⁶Prebble at p.507.

⁵⁷[1938] A.C. 224 at p.240. It was said that "if the parties have in terms in their agreement expressed what law they intended to govern ... prima facie their intention will be effectuated by the court."

& Co. Ltd⁵⁸ to support his argument.

Prebble's contention is that England and America have basically similar rules and that the results in the cases tend to be the same in both America and England. Assuming his argument is correct it is still possible to maintain that there is a world of difference between finding contacts with the chosen law and finding reasons to invalidate its application. As the cases, on both side of the Atlantic show, it is fairly easy to produce contacts and allege a significant or substantial connection. It would be considerably more onerous to show that a choice of law clause was legally objectionable given that connection between the chosen law and the contract is not essential.

Some Conclusions

As New York is a busy commercial centre with both state and federal courts working at a maximum⁵⁹ the number of decisions reported on choice of law issues is obviously considerable. One may find judgments and academic writers to support many different contentions. Indeed many commentators appear to start with a preconceived idea and consider the cases accordingly.⁶⁰

⁵⁸[1956] 1 Ch. 323 at p.341. The court held that the parties' choice was "prima facie evidence of the proper law."

⁵⁹See generally R.A. Posner. The Federal Courts. Crisis & Reform.(1985).

⁶⁰Johnston op. cit. supra n.28 for example at p.52 considers that Siegelman v. Cunard White Star 221 F. 2d. 189 illustrates the "general malaise" towards party autonomy! Penn in a bid to emphasise party autonomy suggests at p.251 that the significant contacts approach "has not been applied in a commercial case where an express choice has been made." Penn is writing in 1985 some seven years after La Beach v.

In an attempt to be impartial it could be said that the case law in New York would appear to establish the following:

1. Party autonomy exists in New York subject to a reasonable relationship requirement. The common law and the Uniform Commercial Code are in accord.
2. Haag v. Barnes⁶¹ applied the significant contacts test despite the presence of a governing law clause. Although not a commercial contract the decision was subsequently applied in two decisions of the United States District Court⁶² which were commercial cases and which contained an express choice of law clause. However a recent decision⁶³ has stated that this is not the basic approach in New York, and that case law supports party autonomy.⁶⁴ Whilst the New York court of Appeals has not again considered the matter it is unlikely that it would today apply the significant contacts test when a choice of law clause existed.

Beatrice Foods 461 F. Supp. 152 (1978) and 4 years after Keystone Leasing v. Peoples Protective Life Ins. 514 F. Supp. 841 (1981). See G.A. Penn. Choice of Law Clauses in Commercial Agreements under New York and English law. (1985) J. Bus. Law 250.

⁶¹ 175 N.E. 2d. 441 (1961).

⁶²La Beach v. Beatrice Foods Co. 461 F. Supp. 152 (1978) was a decision of the Southern District New York United States District Court whilst Keystone Leasing v. Peoples Protective Life Ins. 514 F. Supp. 841 (1981) was a decision of the Eastern District.

⁶³Bank Itec N.V. v. J. Henry Schroeder Bank & Trust 612 F. Supp. 134 (D.C.N.Y. 1985). It may be noted that this is a decision of the same court which decided La Beach v. Beatrice Foods Co. 461 F. Supp. 152 (1978).

⁶⁴Ibid at p.140.

This is especially so when one recalls the fact that Haag v. Barnes⁶⁵ was decided some four years before the introduction of the Uniform Commercial Code into New York.⁶⁶

It is suggested that the cases cited in the footnote below⁶⁷ are exceptional. The risk remains however that interest analysis or the significant contacts test could be employed to upset a choice of law clause.

3. If no express choice of law clause exists then the significant contacts test is applied. This test has been given many names, it is the Auten⁶⁸ principle after the case of that name, it has also been called the contacts test approach or theory and the centre of gravity test, approach or theory. Given that it may be described as a type of government interest analysis it may be said that New York has adopted interest analysis into its law.

⁶⁵ 175 N.E. 2d. 441 (1961).

⁶⁶ It may be noted that in Haag v. Barnes *ibid* and La Beach v. Beatrice 461 F. Supp. 152 (1978) the end result was that Illinois law applied. Thus the parties' expectations were not thwarted. In Keystone Leasing v. Peoples Protective Life Ins. 514 F. Supp. 841 (1981) the court noted that whilst it "finds that the application of Tennessee law is appropriate, it is unlikely that the result would have differed under New York law." *Ibid* at p.847. However in Southern International Sales Co. v. Potter & Brumfield Division of A.M.F. Inc. 410 F. Supp. 1339 (S.D.N.Y. 1976) the parties' expectations here are openly thwarted. See also Business Incentives Co. Inc. v. Sony Corp. of America 397 F. Supp. 68 (1975) and criticisms of the case *infra* at p.296 footnote 87 and pp.298-9.

⁶⁷ *Ibid*.

⁶⁸ Auten v. Auten 124 N.E. 2d. 99 (1954).

4. The 'reasonable relation' requirement and the significant contracts theory may very well produce identical results in any given case. If a choice is reasonably related it is likely to have significant contacts between it and the transaction and vice versa. It has been suggested⁶⁹ that the reasonable relationship requirement presents a "lower hurdle"⁷⁰ than the significant contacts test.⁷¹

Perhaps reference is being made to the fact that judges do not seem to have made too much of the reasonable relationship requirement in the cases on the Uniform Commercial Code.⁷² However there appear to be no New York decisions that have upheld a choice of law clause and found it reasonably related (on the ground that New York is a leading commercial centre) where all the contacts pointed to a different law. However the main point to be made is that whether or not the 'reasonable relation' requirement or the 'significant contacts test' produces the same results there is a basic distinction between the two concepts. The group-

⁶⁹G.A. Penn & T.W. Cashel. Choice of Law clauses under English and New York law (1986) I & II. J. Bus. Law 333 and 497.

⁷⁰Ibid at p.500.

⁷¹No reasons are given by Penn & Cashel. However one could assume that they had in mind the situation where the parties choose New York because of its commercial status. Here the relationship could be reasonable despite the lack of any significant contacts with New York. It is the Restatement (Second) Conflict of Laws Sec. 187 Comment (f) at p.566 situation. However there appear to be no recent New York decisions where this argument has applied where a choice of law clause existed. Gruson, Governing Law Clauses and Gruson, New York Approach in this context cites cases that did not contain a governing law clause. See especially Gruson, New York Approach at p.208, note 6.

⁷²See supra at p.237.

ing of significant contacts would seem to be a methodology to find the proper law where none has been chosen by the parties. The jurisdiction with the most significant contacts would then be the jurisdiction whose law would apply. A reasonable relationship requirement is a qualification to the application of a law which has been chosen by the parties.

CRITICISMS OF THE NEW YORK APPROACH

Four specific criticisms of the reasonable relationship requirement are now considered followed by two general criticisms of the New York Approach. Three cases are then discussed by way of conclusion to the New York law.

Criticisms of the Reasonable Relationship Requirement

1. Neutral Stand Argument

One favourite argument against a reasonable relationship requirement is the so called "neutral stand" approach. Adherents of this view maintain that merchants may reasonably choose a law lacking a reasonable relationship for the very purpose of gaining a neutral stand.⁷³

However from a New York point of view it is arguable that if the parties choose New York law because New York is a leading commercial centre then not only will the court find the reasonable relationship satisfied⁷⁴ but it is

⁷³See for example Deutsche Schachtbau-Und Tiefbohr-gesellschaft m.b.h. v. Ras Al Khaimah National Oil Co. & Shell International Petroleum Co. Ltd. [1987] Vol. 2 Lloyds Law Reports 246 at p.250, and A.A. Ehrenzweig. Choice of Law in California. A "Prestatement". 21 U.C.L.A. Law Rev. 781 at p.791 (1974).

⁷⁴J. Zeevi & Sons v. Grindlays Bank (Uganda) 371 N.Y.S. 2d. 892 (1975) and Intercontinental Planning Ltd. v. Daystrom 300 N.Y.S. 2d. 817. Although not cases containing a choice of law clause these two decisions indicate that a New York court would take this approach.

applying the neutral stand argument anyway.

2. The Reasonable Relation Test Confuses the true issue

It has been argued that the reasonable relationship requirement makes for legal acrobatics. This argument suggests that party autonomy is the norm and that really all the courts are concerned with is that parties do not attempt to circumnavigate the public policy of the forum. What is important is the good faith of the parties in their choice of law clause and to incorporate a reasonable relation test merely serves to confuse the issue.⁷⁵

One writer⁷⁶ has suggested that the object of contract law is to do justice between the parties. From the parties' point of view justice is represented by their own respective laws. The court's idea of justice is represented by the *lex fori*. The reasonable relationship test and the factors used to determine the existence of such a relationship such as place of performance, place of contracting etcetera shed no light at all on which country's rules are appropriate from the point of view of justice to the parties.

3. No Theoretical Basis for the Requirement

If it is accepted that parties may choose a law to govern their contract then it is impossible to justify the reasonable relationship requirement on any theoretical

⁷⁵T.G. Ryan. Reasonable Relation & Party Autonomy Under the Uniform Commercial Code. 63 Marquette L.R. 212 (1979).

⁷⁶A.J.E. Jaffey. The Foundations of Rules for the Choice of Law. (1982) 2 Oxford J. of Legal Studs. 368 at p.374.

ground. Numerous writers have made this point.⁷⁷

The reasonable relationship requirement may be seen as a remnant from the past. The old idea had been that some a priori law applied to a contract. Allowing the parties to choose a law for themselves resulted in the otherwise applicable law being evaded. Allowing party autonomy was an exception which had to be kept within certain limits. Thus the exception of allowing party autonomy was qualified by the requirement that there must be a reasonable relationship between the contract and the chosen law.⁷⁸

Today the exception of party autonomy has become the rule but the qualification remains. It has become the rule for the cases covered by the Uniform Commercial Code and New York case law would suggest that the New York common law has retained the reasonable relationship requirement where parties have incorporated an express choice of law provision into their transaction.

⁷⁷E.G. M.V. Levin. Party Autonomy. Choice of Law Clauses in Commercial Contracts 46 Geo. L.J. 260 at p.263 (1957). A.A. Ehrenzweig. Contracts in the Conflict of Laws (Part 1). 59 Colum. L. Rev. 973 at p.990 (1959). W.L.M. Reese. Power of Parties to Choose Law Governing their Contracts. 54 Proc. Am. Soc. of Int'l L. 49 (1960). D.J. Tuchler. Boundaries to Party Autonomy in the Uniform Commercial Code. A Radical View. 11 St. Louis U.L.J. 180 (1967). Prebble at p.503. Ryan op. cit. supra n.75 at p.237. Gruson. Governing Law Clauses. 351.

⁷⁸The requirement of a reasonable relationship was first introduced into New York by the federal decision of Hal Roach Studios Inc. v. Film Classics Inc. 156 F. 2d. 596 (2d. Cir. 1946). Chase J. held that the court could see no reason why the parties' choice should not control apart from policy considerations of the forum "so long as there is that sufficient relationship to make it reasonable that the law chosen should apply". Ibid at p.598.

4. Difficulties in the Application of the test

It was suggested in the context of the Uniform Commercial Code that the reasonable relationship test was difficult to apply in practice as the Code did not give guides as to what should amount to a reasonable relationship in any given situation.⁷⁹

The same difficulty applies when courts are faced with a contract containing a governing law clause that is to be decided by New York common law. Whilst the recent New York State legislation has abolished the requirement for certain substantial contracts⁸⁰ it continues to exist for many other transactions. However as with the Uniform Commercial Code judges in New York have tended to find the reasonable relationship test satisfied. In the cases considered on party autonomy for New York common law there is no discussion by the courts of the reasonable relationship test. It is merely stated.⁸¹ There appear to have been no difficult cases where New York law has been chosen but where all the contacts necessary to establish a reasonable relationship point overwhelmingly elsewhere. New York judges would probably take the view that even in this situation the choice would be reasonable for

⁷⁹See supra at p.220 et seq.

⁸⁰See N.Y. Gen. Oblig. Law S.5-1401(1) (1984 N.Y. Laws Ch. 421) (McKinney 1986 Supp.) Discussed supra at p.275 et seq.

⁸¹Reger v. Nat. Assn. of Bedding Mafrs. Etc. 372 N.U.S. 2d. 97 at p.114 and Sears Roebuck & Co. v. Enco Associates 401 N.Y.S. 2d. 767. (1976).

"one cannot help but remark that to a judge of the forum the selection by the parties of the law of the forum as the proper law must always appear eminently reasonable."⁸²

Secondly the New York judge would consider it reasonable to choose New York law because of New York's role as an important commercial centre.

However this does not alter the fact that the test is potentially difficult to apply.

Conclusion: Reasonable Relationship Test and Common Law

Whilst the reasonable relationship requirement still exists in New York for cases being decided pursuant to common law the effect of the test is becoming limited.

This is due to three reasons:

1. The courts tend to find a reasonable relationship established without embarking on elaborate analysis of the requirement. It is a requirement that could be said to be tagged on to the choice of law discussion and to which lip service only is paid.
2. The growing tendencies in cases is to state that New York is a leading commercial centre and to uphold New York choice of law clauses as furthering New York's international position. Such a choice is seen as reasonable. If this trend continues then the day will shortly arrive where a choice of New York law will automatically be considered reasonable and the requirement will fall into disuse.

⁸²P.E. Nygh. Conflict of Laws in Australia (1984) (4th edit.) at p.226.

3. The recent legislation with its monetary requirement will apply to more and more cases as the value of money decreases. It may be seen as legislative disapproval of the reasonable relationship requirement.

It seems difficult to find a rational basis for arguing that the parties' choice must be reasonably related to the contract. Whilst it could be seen as reasonable to suggest there should be some connection with the chosen law this argument disintegrates when one considers the fact that if two laws are closely connected with the contract the parties are free to choose one of the two laws even if the one chosen has less interest in the transaction. So if the law with the closest connection may be excluded by party determination, as is the law in New York and England it seems difficult to argue that there must be a connection between the chosen law and the contract as required in New York. Merely to ensure a connection would not seem to have value in its own right.

In this respect Lord Wright's dictum⁸³ that connection with the chosen law is not essential seems more rational.

⁸³Vita Food Products Inc. v. Unus Shipping Co. [1939] A.C. 277 at p.290.

Criticism of Decisions Which Limit or Override
Party Choice

If parties may not rely on their choice of law clauses uncertainty prevails.⁸⁴ If any form of interest analysis is used when a choice of law clause is present in a contract the result is to downgrade the clause to a mere contact to be considered with all other contacts. In such a situation the parties' expectations are not met and this results in uncertainty, and increases the possibility of litigation, two very undesirable consequences.

In La Beach v. Beatrice Foods⁸⁵ it would have been infinitely preferable to have upheld the choice of law clause and applied Illinois law rather than arrive at exactly the same result by embarking on the difficult task of interest analysis. The courts' reasoning is unconvincing as it emphasises the Illinois contacts to reach its conclusion to such an extent that the Nigerian contacts are greatly underestimated. Poor Mr. Amachree, one of the defendants who was Nigerian, is completely overlooked in the process of collecting Illinois contacts. Delaware, New York, London and Geneva contacts are likewise ignored.

Why not uphold the parties' choice in Keystone Leasing?⁸⁶ The contract was commercial; the parties businessmen. They had made a choice of law decision and surely this

⁸⁴Business Incentives Co. Ltd. v. Sony Corp. of America 397 F. Supp. 63 (1975), La Beach v. Beatrice Foods Co. 461 F. Supp. 152 (1978) and Keystone Leasing v. Peoples Protective Life Ins. 514 F. Supp. 841 (1981).

⁸⁵461 F. Supp. 152 (1978).

⁸⁶Keystone Leasing v. Peoples Protective Life Ins. 514 F. Supp. 841 (1981).

should have been upheld to defeat the complaint under New York law rather than dismissing it pursuant to Tennessee law. Given that the parties are not going to be allowed to profit from their unacceptable course of conduct it is preferable to dismiss the action pursuant to their choice of law rather than the law of Tennessee.⁸⁷

In Southern International Sales Co. v. Potter & Brumfield Divisions of A.M.F. Inc.⁸⁸ it was not necessary for the forum to consider the public policy of a state which was neither the forum nor the state of the parties' choice. One party was a manufacturer of electrical products and the other a corporation. They had made a contract a term of which was that a particular law should govern. There is no suggestion in the decision that the parties were not in equal bargaining position. Applying the Puerto Rican legislation results in a windfall for the Puerto Rican corporation. The Indiana manufacturer might never have consented to the application of the Puerto Rican law. He is disadvantaged by the court's failure to uphold the choice of law clause.⁸⁹

By ignoring party autonomy not only are the parties' expectations ignored (as was admitted by the judge)⁹⁰ but

⁸⁷Similarly in Business Incentives Co. Inc. v. Sony Corp. of America 397 F. Supp. 63 (1975) it would have been preferable to have upheld the New York choice of law clause. The New Jersey contacts may be seen to be overemphasised and the public policy contention fallacious. This latter point is discussed in the context of the next criticism below. See *infra* at pp.298-9.

⁸⁸410 F. Supp. 1339 (S.D.N.Y. 1976).

⁸⁹The court even admitted that the choice of Indiana law was reasonably related to the contract. *Ibid* at p.1341.

⁹⁰*Ibid* at p.1343.

other uncertainties arise. What conclusion for example would the court have come to had the distributor not been Puerto Rican but a corporation in a nearby state such as Florida or even Indiana? In such a situation the court might or might not upset the choice of law clause.

The only way to fulfil the goals of certainty, predictability, party expectation and make the law easy to apply is to uphold party autonomy . Cases such as this lead to unpredictable results.

Insufficient Consideration Given to Practical Consequences of Decisions

If the actual result in any given case is going to be identical whichever law is chosen it seems a complete waste of time and effort to devote a huge amount of discussion to the choice of law issue. Rather the court should uphold the party choice pursuant to party autonomy if such a choice has been made. (Alternatively, if the court applied the lex fori in the absence of choice the result would be the same absent a large amount of effort in applying interest analysis). If the actual consequences of the rules are the same it seems unnecessary to do more. Yet despite the fact that pursuant to interest analysis the court does look at the content of rules the cases⁹¹

⁹¹E.g. Haag v. Barnes 175 N.E. 2d 441, (1961); Reger v. National Assn. of Bedding Manufacturers Group Insurance Trust Fund 372 N.Y.S. 2d. 97 (1975); Triange Underwriters Inc. v. Honeywell Inc. 457 F. Supp. 765 (1978); Keystone Leasing v. Peoples Protective Life Ins. 514 F. Supp. 841. (1981).

illustrate that much time and effort is wasted here. The process becomes a 'legal exercise.'⁹²

In Reger's⁹³ case for example six pages of discussion on the choice of law issue are reported. The Auten⁹⁴ principle is considered, the Uniform Commercial Code and the Restatement (Second) Conflict of Laws discussed. Public policy is reviewed in the context of choice of law and renvoi with all its attendant problems canvassed. Finally the court holds that Illinois law governs and notes that the end result would have been identical under New York law anyway.

A closely connected criticism, and therefore considered at this point, is that New York courts do not always consider the implications of their decision and thus curious results can obtain.

In Business Incentives Co. Inc. v. Sony Corp. of America⁹⁵ it will be recalled⁹⁶ that the New York choice of law clause was not upheld partly because New Jersey had a strong public policy in protecting the weaker party. However when the court applied the law of New Jersey the weaker party was not in fact protected. Why not uphold

⁹²Levey v. Saphier 370 N.Y.S. 2d. 808 at p.813 (1975) per Harnett J. The case is an example of party autonomy being upheld. The court "concludes that New York law applies. This is likely a legal exercise however, since the parties seem correctly in agreement that New York and Delaware law are similar for application to the issues here." Ibid.

⁹³Reger v. National Association of Bedding Manufacturers Group Insurance Trust Fund 372 N.Y.S. 2d. 98 (1975).

⁹⁴Auten v. Auten 124 N.E. 2d. 99 (1954).

⁹⁵397 F. Supp. 63 (1975).

⁹⁶Supra at p.286, and p.296 footnote 87.

party autonomy in this situation? It fulfils the parties' expectations and makes for certainty.⁹⁷ Given that the plaintiff fails, would not the family behind Business Incentives Inc. prefer to fail pursuant to their choice of law clause rather than fail and not have their choice of law clause upheld? Party autonomy should have prevailed.

Finally it must be noted that it is not an argument of this thesis that the content of the possible laws⁹⁸ should be considered by the court. At an international level this would be too difficult and time consuming⁹⁹ and unnecessary anyway. The parties' choice should be upheld without the consequences considered or the *lex fori* applied absent such choice.¹⁰⁰

⁹⁷Whatever New York law held it would not thwart New Jersey public policy on the facts of the case. If New York law would uphold the contract then the plaintiff fails. In this situation New York law comes to the same result as New Jersey law and therefore it cannot be said to hinder the latter's public policy. If New York law in fact protected the weaker party (here the New Jersey plaintiff) then it may be seen as fostering New Jersey law by protecting the economically weaker New Jersey plaintiff.

⁹⁸The parties should consider the matter obviously or results like *The Assunzione* (1954) P. 150 obtains. See *supra* at p.139-40.

⁹⁹The content of a law within a state system is obviously infinitely easier to establish than at international level where differences in language and legal concepts make for difficulties.

¹⁰⁰Discussed *supra* at p.139.

Illustrations of the Difficulties Involved with Interest Analysis

Earlier in the thesis the third rule of the Proper law doctrine was criticised. It was held that the test was difficult to apply because of lack of guidelines provided for the judge, because of the multiplicity of potential contacts and the problems associated with weighing such contacts. The lack of stated reasons for the judge's choice, the possibility of abuse of the test and the fact that the end results could be seen as arbitrary all equally apply to interest analysis.

Three cases were given to illustrate these difficulties in the English setting; it therefore seems appropriate to consider three New York decisions to highlight these problems in New York. This trilogy of cases also illustrates the fact that New York judges are arguably in a more invidious position than their English counterparts as they have the added burden of considering policy considerations.

One matter that must be noted is that the term 'contact(s) approach, test or method' is identical to the significant contacts approach, test or method. The centre of gravity is likewise identical. The judge must choose contacts that further state policies; it is a form of interest analysis. In the New York context Auten v. Auten¹ may be seen as applying interest analysis and the "Auten

¹308 N.Y. 155, 124 N.E. 2d. 99 (1954).

approach" has become synonymous with the terms used above. However in the cases the judges not only use all the above terms they also use the words interest analysis or governmental interest analysis. Some cases are decided by reference to 'interest analysis',² whilst others³ intermingle terms such as the 'Auten approach' and 'significant contacts test' within the same paragraph. Finally some decisions refer only to the 'Auten principle' or 'centre of gravity' etcetera approach.⁴

From a theoretical point of view not too much should be made of this. The test is to apply the law of the state that has the greatest interest in having its law or policy applied. This state will usually be the one which has the most significant contacts with the transactions. The object is to locate the contacts that will further the policy which has already been elucidated.

In Haag v. Barnes⁵ the contacts chosen by Fuld J. are not evaluated but merely listed. No reasons are given

²Krauss v. Manhattan Life Ins. Co. 643 F. Supp. F. 2d. 98 (2nd Cir. 1981).

³International Planning v. Daystrom 300 N.Y.S. 2d. 817, (1969) and Index Fund Inc. v. Insurance Co. of North America 380 F. 2d. 1158 (1978).

⁴Hughes v. Marine Midland Bank 484 N.Y.S. 2d. 1000 (City Ct. 1985) cites only Auten and the Uniform Commercial Code. See also American Homes Assurance Co. v. Employers Mutual of Wausau 434 N.Y.S. 2d. 7 (1980). See also Southern Intern. Sales v. Potter & Brumfield Div. 410 F. Supp. 1339 (1976).

⁵175 N.E. 2d. 441 (1961).

why some contacts are included and others excluded. It would be very easy to emphasise the New York contacts.⁶ It would be equally easy to emphasise the Illinois connections. The case has been cited as "one of the most dramatic examples" of piling up contacts with an eye to possible litigation and it is suggested that to allow the lawyer-manufactured contacts, including particularly the choice of law clause to control "is to exalt a rigid formalism above New York's interest in the welfare of the child and mother."⁷

However Norman Barnes had to live somewhere and given that he had always lived in Illinois it is quite reasonable that he should engage an Illinois lawyer. Thus one could go on arguing. Contacts exist with both jurisdictions. One may criticise the case for its lack of emphasis on policy; the contacts should have been evaluated in accordance with whatever policy matters Fuld J. found to exist.⁸

⁶For example one might contend that Dorothy Haag, the complainant, had spent fifteen years in New York. She had worked there as a law secretary, met the defendant in New York and subsequently conceived her child in that state. Shortly after the agreement was signed she took her daughter back to New York and had resided there ever afterwards. New York could thus be seen as the home of mother and child. Her confinement in Chicago may be viewed as not a matter of choice but a last ditch stand to retain the defendant's attention, and in fact evidence was given that Miss Haag went to Chicago because she feared that the defendant was losing interest in her. Even the attorney that she employed whilst in Chicago had links with New York in so far as he had been recommended by a friend in New York.

⁷R. Weintraub. Choice of Law in Contracts. 54 Iowa L.R. 399 at p.417 (1968).

⁸His treatment of the contacts in Auten v. Auten 124 N.E. 2d. 99 (1954) may be compared with his approach in Haag v. Barnes.

The views of Leflar can be seen as relevant here. Leflar, it will be recalled,⁹ held that judges and lawyers looked at the result they desired and worked backwards as it were by arguing some theory that would produce the desired result. In Haag v. Barnes¹⁰ the defendant had amply provided for the New York plaintiff.¹¹ If Miss Haag had been a destitute solo mother the court might well have emphasised New York contacts in order to have her agreement reviewed. Given that she was receiving adequate sums of money there was no reason why Illinois law should not apply.

The conclusion is that interest analysis, centre of gravity test (or whatever name one chooses to describe the approach in New York) is too difficult to apply. It is not enough to instruct judges to choose contacts that will further state policies. Because it is impossible to provide guides that are not too general, and consequently vague, the court must consider each case anew. Thus no helpful body of case law is established. If interest analysis does not work in a satisfactory manner in practice it should not be employed in New Zealand.

⁹Supra at p.188 et seq.

¹⁰175 N.E. 2d. 441 (1961).

¹¹Between 1956 and 1961 almost double the legal amount payable had been advanced by Barnes to Haag by way of maintenance.

Pallavicini v. International Telephone and Telegraph Corporation¹² illustrates the difficulties of applying interest analysis. Again there is an over-emphasis on geographic contacts. The case also highlights other difficulties in this area.

Madame Pallavicini, described as a resident of Rome and Liechtenstein (although perhaps better considered as an international "jet set" person) allegedly entered a contract with Sheraton International (presumably an international corporation.) Negotiations took place with the Corporation's Chairman, one Mr. Boonisar.¹³ The alleged contract was concluded in an aeroplane somewhere between California and New York.

The contract involved the sale of a hotel in Mexico which was owned by a Mexican Corporation, but was run by Antenor Patino, a native of Bolivia but also a resident of France and Portugal. Madame Pallavicini subsequently wished to enforce her oral contract. However the court held that the New York Statute of Frauds applied and Madame Pallavicini failed.

The approach taken by the majority in the decision is typical of the New York approach. Only geographic contacts are considered before the court holds that these contacts give New York a substantial interest in applying its law

¹²341 N.Y.S. 2d. 281 (1973).

¹³Madame Pallavicini had met Mr. Boonisar at a party in Beverly Hills California. They were both on the same flight from California to New York. Madame Pallavicini subsequently stayed two weeks in New York ostensibly to see her fiancé.

"in view of the policy underlying the applicable provision of [the] Statute of Frauds to protect principals in business transactions from unfounded claims and thereby encourage use of New York as a national and international business center."¹⁴ The court also noted that the object of the Statute of Frauds is to protect defendants from alleged informal promises.

The geographic contacts are listed but not evaluated. Of the ten possible jurisdictions¹⁵ only half could seriously be considered as in any way significant.¹⁶ Of these five jurisdictions the place of contracting cannot be determined and must be considered fortuitous. Other than the fact that perhaps Madame Pallavicini met the defendant in California that state is irrelevant as is the place of incorporation of Sheraton International. New York may also be seen as fortuitous; the plaintiff only stayed two weeks and had been going there on a matter unrelated to the contract. Mexico could be seen as the strongest contact, alternatively it might be irrelevant that the hotel is situated in that State.¹⁷

¹⁴Ibid at p.283.

¹⁵Rome, Liechtenstein, Mexico, Bolivia, France, Portugal, New York, California, State Y (being the state over which the litigants were flying at the time a contract was concluded) and State Z (being the place of incorporation of Sheraton International).

¹⁶No one could contend that Rome, Liechtenstein, Bolivia, France or Portugal were in any way significantly involved.

¹⁷If for example the hotel was an international hotel identical to those found the world over. (Alternatively it might have had a definite Bolivian, French or Portuguese atmosphere given its manager.)

It is possible to argue that the contract contains no centre of gravity. However the court relied on a number of telephone calls and from letters sent from New York to give New York a significant interest in the matter. Thus as the dissenting judge¹⁸ pointed out the majority here applies New York law solely on the basis of several telephone calls made by the plaintiff from New York during a fortuitous and brief sojourn there. He concluded that New York therefore lacked the requisite significant relationship.¹⁹

The court placed too much emphasis on the contacts themselves and did not give enough emphasis to the evaluation of the contracts in the context of the policies involved. The telephone calls and letters are unrelated to the policy of fostering New York's international development.

The reason why the New York court applied New York law was because it was the forum. As the forum it wanted its law to govern, and its Statute of Frauds to apply. Under present New York law the forum could only achieve this result by applying some form of interest analysis, thus contacts with New York had to be found. Given that the court could not really find any weight for these contacts the matter of evaluation is glossed over and forum law is applied.

¹⁸ See 341 N.Y.S. 2d. 281 at p.284 per Nurez J.

¹⁹ Ibid.

Once the argument is allowed that New York is a financial capital of the world "serving as an international clearing house and market place for a plethora of international transactions"²⁰ which is a policy matter it wishes to foster, then only lip service is being paid to interest analysis. Given this situation then, if New York is the forum, it will always want its law to apply. Interest analysis has given way to the *lex fori*. Given that it is always preferable for a court to state openly the reasons for its decisions rather than rely on fictions or tortuous reasoning, it would be better if the *lex fori* was openly applied. There is nothing unreasonable in a court applying its law to a contract if the parties had not made a choice of law decision. Madame Pallavicini was doomed to fail²¹ on any approach.

In J. Zeevi & Sons v. Grindlays Bank (Uganda)²² the New York Court of Appeals argued that as a financial capital New York had the greatest interest in having its laws apply. The Court then stated that the parties by listing United States dollars as the form of payment impliedly accept and trust New York law and policies. Thus New York law was applied to a letter of credit which was unenforceable in Uganda where it had been made, due to subsequent government action by President Amin.

²⁰J. Zeevi & Sons v. Grindlays Bank (Uganda) 371 N.Y.S. 2d. 892 at p.898. (1975).

²¹Also the object of her visit to New York to see her fiancé "unfortunately, went amiss". 341 N.Y.S. 2d. 281 at p.283 (1973).

²²371 N.Y.S. 2d. 892 (1975).

The court said

"In order to maintain its pre-eminent financial position, it is important that the justified expectations of the parties to the contract be protected Since New York has the greatest interest and is most intimately concerned with the outcome of this litigation, its laws should be accorded paramount control over the legal issues presented."²³

This looks like interest analysis or the significant contacts test but again it may be argued that it is really the lex fori which is being applied in the disguise of interest analysis. Given the fact that the parties have not made a choice of law decision why not employ the lex fori openly?

Conclusion

"Too often the field of Conflicts appears to be a mental game with infinite complications, destitute of clarity and simplicity and without any certain rules."²⁴

The conclusion is quite simple. Interest analysis is too difficult to apply in practice. It should be abandoned in favour of the lex fori approach in cases where no choice of law clause exists.

In other cases party autonomy should prevail, there would be no reason to limit this freedom of choice by a reasonable relationship requirement. New York might consider it needs such a limitation because litigation in New York state must be in some way controlled.²⁵ This

²³Ibid at p.899.

²⁴J.P. Niboyet. Territoriality & Universal Recognition of Rules of Conflict of Laws. 68 Harv. L.R. 382 at p.386 (1952).

²⁵See generally Posner op. cit. supra n.59 and J. Lieberman. The Litigious Society. (1981) at pp.3-6.

does not apply in New Zealand which is a geographically isolated small commercial centre by world terms.

PART CLIMITATIONS ON PARTY AUTONOMY IN
ENGLAND AND NEW YORK

In Part C the following limitations on party autonomy are considered:

1. Party Autonomy Limited by overriding statutes.
2. The Limitation of Public Policy.
3. The English limits on party autonomy.
4. The Reasonable Relationship Limitation.
5. The contract must be connected with two or more jurisdictions.
6. Third Parties not Affected.
7. Constitutional Limits on Party Autonomy.
8. Meaningless Choice of Law clauses will be disregarded or altered.
9. Limitations on Choice of Jurisdiction.
10. Party Autonomy limited to the substantive law of the Chosen Jurisdiction. No Renvoi.
11. Choice of Law limited to certain issues.
12. Parties may not choose a law to govern procedure.
13. The parties must both agree on the Choice of Law clause. (The Problem of Adhesion Contracts and Party Autonomy).
14. Limitations of Party Autonomy relating to time of choice and number of possible choices.

1. Party Autonomy Limited by Overriding Statutes.

To the extent that a statute will override an express choice of law clause it may be said that statutes provide a limitation on party autonomy.¹

According to standard conflict of laws doctrine a statute does not normally apply to a contract unless it forms part of the proper law or unless (being a statute in force in the forum) it is procedural. Overriding statutes are those which must be applied regardless of the normal rules of conflict of laws because the statute says so, or is interpreted to intend such a result.²

Thus for example in Boissevain v. Weil³ the House of Lords held that Section 3(1) of the Emergency Powers (Defence) Act 1939(U.K.) was an overriding provision that applied regardless of the proper law of the contract.⁴

Statutes which put into effect international conventions and which pertain to international transport⁵

¹See generally A. Nussbaum. Principles of Private International Law. (1943) at p.69 et seq.
Dicey & Morris at p.14 et seq.
Morris & North at p.676 et seq.
J.H.C. Morris. The Choice of Law in Statutes (1946) 62 L.Q.R. 107.
K. Lipstein. Inherent Limitations in Statutes in the Conflict of Laws. (1977) 26 I.C.L.Q. 884.
F.A. Mann. Uniform Statutes in English Law. (1985) 99 L.Q.R. 376.
W.L.M.. Reese. Statutes in Choice of Law. 35 Am J. of Comp. Law. 375 (1987).

²Dicey & Morris at p.19.

³[1950] A.C. 327. Discussed above in the context of illegality. See supra at p.90.

⁴See discussion by Dicey & Morris at p.20.

⁵E.g. Carriage of Goods by Sea Act 1924 (U.K.) and the Carriage of Goods by Air Act 1961 (U.K.)

provide examples of overriding statutes.⁶ For example in The Hollandia⁷ the House of Lords held that an English Act which put into effect an International Convention⁸ applied to a contract which contained an express choice of Dutch law to govern the contract.

A large machine had been shipped from Scotland to the Dutch West Indies aboard a Dutch vessel. Dutch law applied the Hague Rules and limited the carrier's liability to approximately two hundred and fifty pounds. Under the amended Hague/Visby Rules scheduled to the United Kingdom Carriage of Goods by Sea Act 1971 the limit of liability was about eleven thousand pounds. The English Act applied. Lord Denning⁹ in the Court of Appeal had explained why this was so.

".... there is a higher public policy to be considered- and that is the public policy which demands that in international trade all goods carried by sea should be subject to uniform rules governing the rights and liabilities and the limitation of liability of the parties. They should not vary according to the particular country or place in which the dispute is tried out. So many persons are concerned down the chain - buyers and sellers, bankers and insurers, indorsees and consignees - that each should know what the rules are without having to go by the small print in any particular Bill of Lading."

⁶See M.S.W. Hoyle. Private International Law. Cases and Materials. (1982) at p.226. Dicey & Morris at p.22 et seq. Morris & North at p.682 et seq. See also J.H.C. Morris. The Scope of the Carriage of Goods by Sea Act 1971 (1979) 95 L.Q.R. 59 and F.A.Mann. Statutes & The Conflict of Laws. (1972-1973) 46 B.Y.B.I.L. 117.

⁷[1983] A.C. 565.

⁸The Hague/Visby Rules were made part of English law by the Carriage of Goods by Sea Act 1971 (U.K.)

⁹[1982] 1 All E.R. 1076 at p.1080.

In other words the principle of international co-ordination and unification of maritime law take precedence over the particular individual contract and its choice of law clause. Or as Morris put it -

"the truth is, surely, that when an international convention is given force of law in the United Kingdom, its provisions apply to all disputes within its scope regardless of the proper law of the contract."¹⁰

This is potentially a very important limitation on the concept of party autonomy.

Three situations can be considered in the context.

1. A Statute¹¹ in force in the forum could override an express choice of law clause. The Hollandia¹² illustrates this situation.
2. A statute in force in the loci solutionis could override an express choice of law clause. This situation was discussed in the context of illegality above.¹³
3. A statute in force in the jurisdiction which would be that of the proper law (absent an express choice of law clause specifying another jurisdiction) could override an express choice of law clause.

¹⁰Morris op. cit. supra n.6 at p.66.

¹¹Whilst legislative laws are referred to here the same applies to common law rules. A common law rule could equally override a choice of law clause. The discussion includes both types of law but is considered in terms of legislative laws as it is most likely that it will be a legislative rule that upsets a choice of law decision.

¹²[1983] A.C. 565.

¹³See supra at p.92.

Forum Statutes

Justification for forum statutes overriding Choice of Law Clauses.

A number of justifications have been advanced for overriding an express choice of law clause.

1. First, it is argued that public policy requires uniformity in the law. Thus a statute which puts into effect an international convention should be given preference to the parties' choice.¹⁴
2. Secondly as Lord Denning pointed out in The Hollandia¹⁵ it is much easier for everyone involved in the transaction to know in advance what law will govern rather than have to elicit the parties' choice by reading the contract.
3. Thirdly, the judge may decide that the forum's legislation is designed to protect the weaker party and he therefore applies the forum law rather than the choice of law clause to protect the weaker party in the contract.

Arguments against Applying Forum Rules or Laws

1. It is difficult to see why uniform statutes¹⁶ in general should be made a matter of public policy.¹⁷

¹⁴See Morris op. cit. supra n.6.

¹⁵[1983] A.C. 565. See supra at p.312.

¹⁶I.e. statutes designed to create uniformity in the law.

¹⁷In The Hollandia [1983] A.C. 565 it was not really a matter of public policy whether the shipowner should be liable for each kilo of gross weight rather than for each package or unit lost or damaged. See Mann op. cit. supra n1 at p.399.

As Mann¹⁸ has noted "it cannot be a matter of public policy in the eyes of anyone who remembers how inadequate, illusory and elusive unification is in the real world. In other words unification is an abstract ideal. In the concrete case what is, or purports to be done in its name may often contribute to the intensification of diversity."

Uniformity of rules is impossible and "to continue the frequently illusory process by harmonising the conflict of laws may make confusion worse confounded."¹⁹

The advantage of party autonomy is that it achieves certainty. By aiming at uniformity of laws and sacrificing party autonomy nothing is achieved.

As Mann²⁰ asks:

"Does it really make sense that, when an English court is concerned with a transport by road from Stockholm to Rome, it should apply the convention scheduled to the Carriage of Goods by Road Act 1965 as interpreted in England, although the contract between the parties is governed by Swedish law which has attributed to the provision in issue a definite meaning? It is difficult to believe that there exists any English public policy requiring so singularly unattractive a result."

2. There is no reason why a judge should apply his own country's protective legislation to a contract the proper law of which is not that of the forum. This is so no matter whether one or both parties are from the forum state.²¹ The parties have agreed on a law and only that law should be upheld. Indeed as

¹⁸Ibid.

¹⁹Ibid.

²⁰F.A. Mann. The Proper Law in the Conflict of Laws. (1987) 36 I.C.L.Q. 437 at p.446.

²¹Both parties could be New Zealanders but the subject matter and other factors could be connected with say Japan, thus making the contract international.

Vischer²² notes "modern legislation may even have a tendency of being overprotective, not treating as adults even those persons who can look out for themselves and defend their positions."

One may also argue, that in the case where the litigants are foreign it is not appropriate to apply laws that were passed with the forum's citizens in mind.²³

Alternatively it may be argued that no matter how general in application the law was intended to be in its protective scope there is no reason in logic or justice why parties should be able to avoid their bargain (including the effects of the choice of law clause) because of some forum law. If parties have genuinely agreed on a choice of law clause, convenience and certainty require it be upheld.

3. In answer to Lord Denning's views concerning the persons down the line, if his argument was taken seriously it would make a complete mockery of party autonomy. It is the parties' contract and the parties are the persons who must receive first consideration. They have organised their affairs on the premise that a certain law will apply; surely that consideration is of greater importance than any possible inconvenience to strangers to the contract who will be required to read the contract.

²²T. Vischer. Drafting National Legislation on Conflict of Laws: The Swiss Experience. (Spr. 1977) 41 No. 2 Law & Contemp. Probs. 131 at p.143.

²³See supra at p.103 where Morris did not see why English legislation should apply to a *Aradian* schoolboy.

Statutes in force in the loci solutionis

These statutes have been taken into account by courts as was discussed in the context of illegality.²⁴ The public policy of the forum requires that foreign statutes should in certain circumstances be considered. It is suggested below²⁵ that public policy is rarely evoked by English courts and the only decisions reported in this area concern contracts the proper law of which was England. One may say that if the circumstances are sufficiently grave and serious to warrant the concept of public policy being evoked then in these rare situations party autonomy must bow to public policy. The real problem lies with the third situation.

Statutes of a Third Jurisdiction

The European Economic Convention on the law applicable to Contractual Obligations (1980) suggests that in certain circumstances the "mandatory rules" of a state which is neither the state of the proper law nor the *lex fori* be taken into account.²⁶ Again the justification is that public policy requires such an approach.

Mandatory rules are compulsory rules or "*jus cogens*".²⁷

²⁴See *supra* at p.92 et seq.

²⁵*Infra* at p.333 et seq.

²⁶See *infra* at p.434 et seq.

²⁷See M. Wolff. The Choice of Law by the parties in International Contracts (1937) 49 *Juridical Review*. At p.110 et seq.

The essence of such rules is that they are compulsory and not optional but obligatory. They are the opposite of optional (*jus dispositivum*) rules. Public policy rules for example are considered compulsory rules but many compulsory rules are not matters of public policy.

It is argued below²⁸ that these mandatory rules of a third state should not override an express choice of law clause. A number of reasons may be cited for this conclusion.

1. The problem of determining what amounts to a forum mandatory rule is difficult for the judge. The difficulties in establishing what amounts to a foreign mandatory rule are even more pronounced. New Zealand courts do not have the machinery for eliciting such rules.
2. Justice does not require that parties who have made a choice of law decision, and regulated their affairs accordingly, should be subject to laws which are neither part of the *lex fori* nor the proper or applicable law. There is no reason why parties should be hounded by some rule that by their very choice of law clause they have evaded.

If the parties have agreed, and there must be that true agreement, then the choice of law clause must prevail. The forum is only the venue for the parties who have made their decision. This is in line with domestic contract law in New Zealand, which allows parties a wide degree of discretion in choosing the terms of their contract and a considerable

²⁸Infra at p.441 et seq.

latitude in contracting out of otherwise applicable conditions.

3. In so far as application of a mandatory rule of a third jurisdiction would override a choice of law clause it must be considered unsatisfactory because it introduces uncertainty into an area otherwise certain.

The Problem

It is suggested that mandatory rules of a third jurisdiction²⁹ be ignored and that judges should not be tempted to apply protective legislation of the forum to litigants of an international contract.

However there remain mandatory rules of the *lex fori* that are not protective. Here the word 'mandatory' bears the same meaning as above; it is a rule that is obligatory. Should a New Zealand judge be asked to ignore compulsory rules of the forum when deciding an international dispute? At one end of the scale the problem is easily solved. If the contract offends public policy then the judge will subject the choice made by the parties to the public policy. Here the mandatory rule is seen as sufficiently important to warrant application of the concept of public policy. At the other end of the spectrum a judge is not likely to consider some petty minor regulation applicable in the forum. However there is a large grey area where mandatory

²⁹The English have opted not to consider such rules. See the European Economic Convention on the Law Applicable to Contractual Obligations. (1980) discussed *infra* at p.410 et seq.

rules could apply. In Golden Acres Ltd. v. Queensland Estates Pty. Ltd.³⁰ it will be recalled that a licence was required to act as a real estate agent in Queensland.³¹ The parties chose Hong Kong law to govern their contract. Should the relevant Act be ignored or upheld?

There are a number of possible solutions. First however the judge must just decide that the law in question is mandatory or obligatory. Although he is considering forum law this is still not necessarily an easy question to answer. Given that he decides a law is mandatory he can do any of the following:

1. He may have a direct confrontation with the choice of law clause. Hoare J. for example in the Golden Acres decision decided the choice of Hong Kong law was made to avoid application of the Queensland legislation, that this was not a bona fide choice and that it was contrary to public policy. Thus the choice of law clause was set aside and Queensland law applied.
2. Before any question of law arises a court may, and some say should,³² determine whether any statute or common law rule of the forum applies of its own force (rather than by virtue of a choice of law rule) to the case in hand. The approach was taken by Menzies J. in Freehold Land Investments Ltd. v. Queensland Estates Pty. Ltd.³³ The first question was whether the claimant acted as a real estate agent in Queensland,

³⁰[1969] St. R. Qd. 378

³¹By virtue of Section 23 of the Auctioneers, Real Estate Agents, Debt Collectors, and Motor Dealers Acts 1922-1961.

³²See D. St. L. Kelly. International Contracts & Party Autonomy. (1970) 19 I.C.L.Q. 701 et seq.

³³(1970) 123 C.L.R. 418 at p.425.

not what was the proper law of the contract. On the facts Menzies J. held that the conduct was not within the act. He was thus able to reach his decision without infringing the party autonomy rule. Even if the majority³⁴ who did decide that the claimant was acting as a real estate agent were correct, if Menzies J.'s approach³⁵ is adopted the Act applies but the choice of Hong Kong law is not completely invalid; it still applies subject to the Queensland Act.

3. Another possibility, available in limited situations, is to hold that the question at issue is not properly classified as a contractual issue. For example in Queensland Estates Pty. Ltd. v. Collas³⁶ Campbell J. said that whatever the parties had intended concerning the choice of law the matter of the lodgment of caveats against dealings with the lands was the sole concern. Thus the proper law was not relevant.³⁷
4. In general the proper law should apply rather than the mandatory rule. This is in "harmony with the demands of justice as well as the requirements of established law."³⁸ Parties expect their choice to be upheld and organise their affairs around

³⁴Barwick C.J., McTiernan J. and Walsh J.

³⁵See also Menzies J. judgment in Kay's Leasing Corp. Pty. Ltd. v. Fletcher & Another (1964) 116 C.L.R. 124 at p.146 in contrast to the majority Judgment and that of Kitto J.

³⁶[1971] St. R. Qd. 75 at p.81.

³⁷See M. Pryles. Reflections on the E.E.C. Contractual Obligations Convention. An Australian Perspective in Contract Conflicts. The E.E.C. Convention on the law applicable to Contractual Obligations. A Comparative Study. (ed. P.M. North) (1980).

³⁸Mann op. cit. supra n.1 at p.392.

the chosen law. Judicial support for this view can be found in two decisions.³⁹ As Mann notes⁴⁰ the court in Monterosso Shipping Co. Ltd. v. International Transport Workers Federation⁴¹ clearly proves the applicability of an English Statute depends on the proper law of the contract being English, and "that, subject to statutory prohibition, illegality or public policy, a reasonable choice of law bona fide made overrides the mandatory rules of any other law and is the very essence of the doctrine of the proper law."

The only exception would be where the statute or rule lays down its own conflicts rule which eliminates or restricts the parties' choice.⁴²

³⁹Rustenberg Platinum Mines Ltd. v. Pan American Airways [1979] 1 Lloyd's Law Rep. 19
⁴⁰Monterosso Shipping Co. Ltd. v. International Transport Workers Federation [1982] 3 All E.R. 841.

⁴⁰Mann op. cit. supra n.1 at p.394.

⁴¹[1982] 3 All E.R. 841.

⁴²See Mann op. cit. supra n.1 at p.394. E.g. see S.27 of the Unfair Contract Terms Act 1977 (U.K.)

S.27.(1) Where the proper law of a contract is the law of any part of the United Kingdom only by choice of the parties (and apart from that choice would be the law of some country outside the United Kingdom) sections 2 to 7 and 16 to 21 of this Act do not operate as part of the proper law.

(2) This Act has effect notwithstanding any contract term which applies or purports to apply the law of some country outside the United Kingdom, where (either or both) -

(a) the term appears to the court, or arbitrator or arbiter to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of this Act; or

(b) in the making of the contract one of the parties dealt as consumer, and he was then habitually resident in the United Kingdom, and the essential steps necessary for the making of the contract were taken there, whether by him or others on his behalf.

For example S.9 of the Sea Carriage of Goods Act 1924-1973 (Australia) provides that the Hague Rules shall apply to every bill of lading issued in Australia without any regard to any submission to a different system of law.

The Statute would clearly have to be stating a conflict of law rule before a choice of law clause was overridden.⁴³

A New Zealand example is Section 11A of The Sea Carriage of Goods Act 1940.⁴⁴

The advantages of this last approach championed by Mann are considerable. Party autonomy is maintained with all its attendant advantages. Secondly to disregard the

For another important example see Art. VIII 2(b) of the Articles of Agreement of the International Monetary Fund (I.M.F.) printed in full in K. Mettala. Governing Law Clauses of Loan Agreements in International Project Financing. (Winter 1986) Int'l Lawyer. 219 at pp.227-8. A court can on the basis of Art. VIII 2(b) refuse to apply any agreement, regardless of the law chosen by the parties, if the agreement is an 'exchange contract' contrary to the exchange control regulations of a member country and involving its currency. Article 41 of the Convention on the Contract for the International Carriage of Goods by Road (signed on 19th May 1956 at Geneva) which is scheduled to the Carriage of Goods by Road Act 1965 (U.K.) holds "any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void." This may be seen as a special though limited conflicts rule. See Mann op. cit. supra n.1 at p.394.

⁴³See Mann *ibid*, who points out that terms such as "the force of law" would not elevate an ordinary rule with an overriding rule. See Sec. 7 Carriage By Air Act 1967(N.Z.)

⁴⁴which states
 'New Zealand law and jurisdiction of New Zealand Courts.
 (1) All parties to any bill of lading or other document relating to the carriage of goods by sea from any place in New Zealand to any place outside New Zealand shall be deemed to have intended to contract according to the law of New Zealand; and any stipulation or agreement to the contrary or purporting to oust or restrict the jurisdiction of the courts of New Zealand in respect of such bill of lading or other document shall be of no effect.
 (2) Any stipulation or agreement whether made in New Zealand or elsewhere, purporting to oust or restrict the jurisdiction of the courts of New Zealand in respect of any bill of lading or other document relating to the carriage of goods by sea from any place outside New Zealand to any place in New Zealand shall be of no effect.'

content of the proper law would in many, perhaps in most, cases lead to the exclusive control of the *lex fori* and therefore to unsatisfactory results, for it would necessarily set aside the expectations of the parties. Thirdly this approach is in harmony with present English conflict of laws doctrine. The leading English decision remains the Vita Food Products⁴⁵ case. The choice of law clause was upheld. The case has been interpreted in a number of ways.⁴⁶ Some criticise the decision pointing out that the effect of the case was that the carrier was granted full freedom of contract although the country where the cargo was loaded, the country of destination and the country where the litigation took place had all adopted mandatory Hague Rules enactments.

Others⁴⁷ have suggested that it is "one of the greatest cases in English law decided by one of the strongest judicial committees ever formed."

⁴⁵Vita Food Products Inc. v. Unus Shipping Co. Ltd.
[1939] A.C. 277.

⁴⁶See *supra* at p.34 et seq. and see Dicey & Morris at p.756; Morris at p.271 especially footnote 31; Mann op. cit. *supra* n.1 at p.397; S. Braekhus. *Choice of Law Problems in International Shipping*. (1979) 111 *Recueil des Cours* 255 at p.328; and Morris op. cit. *supra* n.1 at p.66.

⁴⁷Mann, *ibid*.

If one adopts Mann's views then the Vita Foods⁴⁸ decision is acceptable, and The Hollandia⁴⁹ decision is regrettable.⁵⁰ For as Mann⁵¹ has stated

"Take a bill of lading issued in Rio de Janeiro under Brazilian law for a shipment from Rio to Hamburg and providing for the jurisdiction of the English courts or for arbitration in London. The carrier has no doubt calculated freight on the basis of his potential liability under Brazilian law. He has covered himself by insurance to the same extent. The conflict of laws was developed for the very purpose of protecting ... the contractual or other rights and obligations as created by the proper law. To override them cannot be readily supported."

Conclusion

Choice of law clauses should prevail over forum legislation or rules unless the particular law is expressly stated to override the choice of law clause, or its object clearly so requires. If this proposal was adopted party autonomy would be protected and yet Parliamentary intent (most of the rules are likely to be statutory) will not be thwarted. It appears to be a happy compromise.

Foreign laws are considered only in so far as the forum's public policy is relevant. For example New Zealand would not jeopardise its international relations by enforcing a contract which involved an illegal action by the *lex loci solutionis*.

⁴⁸Vita Food Products v. Unus Shipping Co. Ltd. [1939] A.C. 277.

⁴⁹[1983] A.C. 565.

⁵⁰See the criticism by Mann op. cit. supra n.1 at pp.397-8.

⁵¹Mann op. cit. supra n.1 at p.392.

The proposed solution also overcomes the difficulty facing a judge who is asked to uphold a choice of law clause which avoids some rule considered mandatory in the forum. If the mandatory rule is sufficiently important to constitute application of the public policy concept, then no real difficulty arises, and by applying the proposed solution the mandatory rule will have to be that important before it is considered overriding. The answer must be that there is no point in talking of mandatory rules which fall short of public policy. To do so leads the judge into potentially very difficult areas of grey and could result in the unacceptable result that party autonomy is severely limited.

2. Public Policy

"We now come to the last and most important limitation of all"⁵²

"What is public policy? Is it a moral idea of a nation? A nation as an identically thinking unit does not exist, this conception of a nation is a fiction. Is it 'public opinion'? What is this? Usually an idea conceived by a few and artificially spread, always uncertain with regard to the number of its supporters. Is it a notion springing from some mysterious source Or is it a rule generally used by the courts ... without any question whether 'the public approve of it or no?'"⁵³

Public policy may be considered in two ways. It may be seen as a general exception available to a court making any conflict of law decision. The general exception allows a court to reject another state's law because it is incompatible with the public policy of the forum state. A court looks only to the public policy of its own state in deciding whether to apply this general exception.⁵⁴

Alternatively the court can consider the public

⁵²W.L.M. Reese. Power of Parties to Choose Law Governing Their Contracts. 54 Proceedings Am. Soc. of Int'l Law. 49 at p.53 (1960).

⁵³B. Starke. Conflicts on Public Policy (1953). 39 Grotius 39 at pp.79-80.

⁵⁴See generally A.G. Paulsen & M.I. Sovern. "Public Policy" in the Conflict of Laws. 56 Colum. L. Rev. 969 (1956). C.B. Nutting. Suggested Limitations on the Public Policy Doctrine. 19 Minnesota L.R. 196 (1935). L.C. James. The Effects of the Autonomy of the Parties on the Validity of Conflict of Laws. "Illegal Contracts", Sunday Gambling, Lottery and Other Agreements. 8 The Am. Univ. L.R. 67 at p.68 footnote 3 (1959). James lists another 14 references besides the above two articles. D.C. Burger. Notes. Transnational Public Policy as a Factor in Choice of Law Analysis. 5 New York Law School J. of Int'l & Comp. Law 367 (1984).

policy of the foreign state when considering any given issue.⁵⁵

Public policy may also be seen as an exception to party autonomy in so far as a court will not uphold a choice of law clause because of public policy considerations. Both aspects of public policy are considered below in the context of New York and England.

Public Policy in America

"The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent concept of good morals, some deep-rooted tradition of the common weal."⁵⁶

Public policy has been evoked throughout the world as a fundamental principle of private international law. Generally speaking the public policy concept has a negative character, courts use it either to decline to entertain

⁵⁵For example in A-G of New Zealand v. Ortiz [1982] 2 W.L.R. 10 Staughton J. at p.31 said "if the test is one of public policy, ... there is every reason why the English courts should enforce Section 12 of the Historic Articles Act 1962 of New Zealand. Comity requires that we should respect the national heritage of other countries, by according both recognition and enforcement to their laws which affect the title to property while it is within their territory. The hope of reciprocity is an additional ground of public policy leading to the same conclusion." The case involved a Maori carving that was to be put up for auction at Sotheby's. The above section provides that any articles exported in breach of the Act shall be forfeited to Her Majesty. The House of Lords [1984] 1 A.C. 1 was unable to construe the legislation in a manner that would allow the carving to be returned to New Zealand.

⁵⁶Loucks v. Standard Oil Co. of New York 224 N.Y. 99 at p.111, (1918).

a suit or to refuse to apply the foreign law which has been selected by a rule of private international law. It has what Dolinger⁵⁷ calls a "barrier effect, a rejecting role."⁵⁸ Whilst public policy can function positively as "real international public policy"⁵⁹ the scope of the discussion on public policy here is limited to the effect the doctrine has on choice of law clauses.

Section 90 of the Restatement (Second) provides that "no action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum." The same principle was applied in Section 612 of the First Restatement. The Restatement (Second) it will be recalled also acknowledges that foreign public policy deserves respect. Section 6(2)(b) includes among the factors relevant in the choice of law process the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue. Likewise Section 187(2)(b) provides that the law of a state chosen by the parties to govern their contractual rights will not be applied if "application of the law of the chosen state would be contrary to fundamental policy of a state, which has a materially greater interest than the chosen state in the determination of the particular issue which, under the rule of Section 188 would be the state of the applicable law in

⁵⁷J. Dolinger. World Public Policy: Real International Public Policy in the Conflict of Laws. 17 Texas Internat. L. Rev. 167 (Spr. 1982).

⁵⁸Ibid at p.169.

⁵⁹Ibid at p.177.

the absence of the effective choice of law by the parties."⁶⁰

Courts have also used public policy in choice of law issues not so much out of dislike for the applicable foreign law but rather in Cavers' terms, as a device to escape from the injustice or incongruity of applying the foreign law in a particular case.⁶¹

Turning to New York case law the effect of an otherwise valid choice of law clause stipulating foreign law may be limited by the public policy of New York if New York is the forum state. The difficulty is assessing what actually amounts to public policy in New York. It appears that the public policy must be of special importance to New York.

In Reger's⁶² case the court said that the rule to be

⁶⁰See also Restatement (Second) Section 187 comment (g) at p.567. Prebble at p.512 considers this provision somewhat broad. He gives as example a contract made in East Berlin to smuggle a man to the West for payment expressed to be governed by the law of New York. Should a New York court refuse to hear the claim because of the affront to East German public policy? Prebble concludes that the extent to which the forum applies the public policy of a second state should be at least qualified by the forum's own public policy. This would appear to be a valid argument.

⁶¹D. Cavers. A Critique of the Choice of Law Problem. 47 Harv. L.R. 173 at pp.180-4 (1933). See also Note. The Public Policy Concept in the Conflict of Laws. 33 Colum. L. Rev. 508 at p.513 (1933) and see G.J. Simson. The Public Policy Doctrine in Choice of Law: A Reconsideration of older themes. 3 Washington Univ. L. Rev. 391 at p.393. (1974).

⁶²Reger v. Nat. Assn of Bedding Mfrs. etc. 372 N.Y.S. 2d. 97 (Sup. Ct. 1975).

applied is rather simple: in group insurance policies a choice of law provision should be given effect unless it contravenes this state's public policy. The court went on to define public policy as "variable"⁶³; "it changes with the times through enactment of new laws and judicial pronouncements and generally means the law of the state as found in its constitution, statutes and judicial decisions."⁶⁴

Other cases have used the words "strong public policy"⁶⁵ and "strong countervailing public policy."⁶⁶ It seems that the contract must be such that its judicial enforcement "would be the approval of a transaction which is inherently vicious wicked or immoral and shocking to the prevailing moral sense."⁶⁷

⁶³372 N.Y.S. 2d. 97 at p.116.

⁶⁴Ibid. See also M. Gutzwiller. Conflict on Public Policy (1953) 39 Grotius 39 at pp.78-9 for changes in English public policy.

⁶⁵Sears, Roebuck & Co. v. Enco Assoc., 370 N.Y.S. 2d. 338 at p.348 (Sup. Ct. 1975).

⁶⁶Nederlandse Draadindustrie ND1. B.V. v. Grand Pre-Stressed Corp. 466 F. Supp. 846, at p.851 (E.D.N.Y.) 1979).

⁶⁷This was held in Intercontinental Hotels Corp. (Puerto Rico) v. Golden 238 N.Y.S. 2d. 33 (1963). The court held that New York should not deny a party an action to recover for gambling debts incurred in Puerto Rico and enforceable under Puerto Rican law. No governing law clause was involved.

Gruson⁶⁸ suggests that whilst public policy is frequently mentioned it rarely operates to defeat a choice of law clause.⁶⁹ If public policy is evoked it does not lead to the whole clause being held invalid; it only restricts its effects with respect to the issue to which the public policy is addressed.⁷⁰

The public policy which may override an effective choice of law clause need not be the public policy of the forum. In Fricke v Isbrandtsen Co.⁷¹ for example the Court considered the public policy of Germany towards steamship tickets. Two other diversity cases likewise consider non forum public policy. (There appear to be no cases decided by New York courts which have considered non forum policy.)⁷²

In Southern Int'l Sales Co. v. Potter & Brumfield Div. of A.M.F. Inc.⁷³ it was held that the fundamental policy of Puerto Rico could not be circumvented by the stipulation that Indianian law was to apply. Likewise in

⁶⁸Gruson Governing Law Clauses at p.375 cites two cases where public policy was strong enough to override a stipulated law. It is interesting to note that he had to retreat into the past (by half a century) to find two cases to illustrate his point.

⁶⁹Gruson Governing Law Clauses at p.375.

⁷⁰Ibid at p.374 footnote 140.

⁷¹151 F. Supp. 465.

⁷²Gruson Governing Law Clauses at p.377 footnote 149.

⁷³410 F. Supp. 339 (S.D.N.Y. 1976).

Business Incentives Co. v. Sony Corp. of America⁷⁴ the District Court for the Southern District of New York held that New Jersey had a strong public policy in protecting the relatively powerless consumer or small business man from more powerful commercial giants, and applied that law rather than New York law which had been chosen by the parties.

Finally in the American context Gruson notes that as the Uniform Commercial Code Section 1-105 does not mention a public policy limitation on party autonomy it is to be presumed that the general conflict of laws rule as to public policy would apply to choice of law clauses upheld by the Section.⁷⁵

English Courts and Public Policy⁷⁶

Public Policy Generally

Public policy may also be used in England to avoid the application of a foreign law otherwise applicable.

"Whenever the courts of this country (i.e. England) are called upon to decide as to the rights and liabilities of the parties to a contract, the effect on such contract of the public policy of this country must necessarily be a relevant consideration."⁷⁷

⁷⁴397 F. Supp. 63 (S.D.N.Y. 1975).

⁷⁵Gruson Governing Law Clauses at p.379 and see supra at p.243.

⁷⁶See generally Dicey & Morris at p.83 et seq.; Morris at p.42 et seq; Cheshire & North at p.145 et seq.

⁷⁷Dynamit Actien - Gesellschaft v. Rio Tinto Co. Ltd. [1918] A.C. 292 at p.302 per Lord Parker.

Whilst "an English court will refuse to apply a law which outrages its sense of justice and decency"⁷⁸ once again the difficulty is in stating the boundaries of the doctrine. The text book writers agree that the concept is evoked more frequently on the Continent of Europe and they also agree that the public policy must be fundamental;⁷⁹ from then on the tendency is to give a list of occasions when contracts valid by their governing law have not been enforced. It is not enough that the foreign law is contrary to some imperative rule of the common law which the parties to an English contract cannot disregard.⁸⁰ The foreign law must be considered as a whole and its result in the actual case considered.⁸¹ Only rarely will a foreign law itself be regarded as contrary to English public policy.⁸²

The lists given in the textbooks⁸³ yield little

⁷⁸In the Estate of Fuld (No.3) [1968] P. 675 at p.690 per Scarman J.

⁷⁹See Dicey & Morris Rule 2 at p.83.

⁸⁰Thus an English court will enforce a contract made without consideration. See Re Bonacina [1912] 2 Ch. 394.

⁸¹Dicey & Morris at p.84.

⁸²*Ibid.*

⁸³Dicey & Morris at p.85; Morris at p.44; Cheshire & North at p.145 et seq.

principle⁸⁴ and it has been suggested⁸⁵ that Dicey & Morris play down the operation of public policy as a restricting element in English law.

It seems from reviewing these lists that few cases will be defeated by the use of public policy. This is perhaps due in part to the belief that public policy areas are a matter for the legislature rather than the courts. Since the constitutional struggles of the seventeenth century English judges have shown a marked disinclination to override the common law by considerations of public policy, a disinclination which has been carried over into the choice of law process.

The attempt to keep forum public policy within narrow limits may be illustrated by a number of recent cases.

In Vita Food Products, Inc. v Unus Shipping Co. Ltd.⁸⁶ the Privy Council must have been aware of the Hague Rules and the strong policy of England, Newfoundland and the international community in having the Rules apply to all bills of lading in order to obtain uniformity in the world's

⁸⁴D. Jackson. Mandatory Rules & Rules of "Ordre Public" p.69 Chapter 4 of Contract Conflicts. The E.E.C. Convention on the Law Applicable to Contractual Obligations. A Comparative Study. Ed. P.M. North (1980).

⁸⁵Ibid.

⁸⁶[1939] A.C. 277.

laws relating to the carriage of goods by sea. However by upholding the English choice of law clause this policy was defeated.

Likewise in Sayers v. International Drilling Co. N.V.⁸⁷ the English public policy of protecting English employees was subjected to foreign law. An Englishman had signed a contract in England to work on the defendant's oil rig off the coast of Nigeria. The defendant was a Dutch company. The contract excluded the defendant's liability for personal injury which was valid by Dutch law but void by English law.

The Court of Appeal applied Dutch law and so denied the Englishman any compensation.⁸⁸

In the recent decision of Mitsubishi Corp. v. Alafouzos⁸⁹ Mr. Justice Steyn stated that contractual disputes must be resolved in accordance with settled principles and rules of the law of contract but "exceptionally, the dictates of a recognised head of public policy, grounded on incontestable and fundamental moral considerations, operate to render defeasible what would otherwise be enforceable contractual rights."⁹⁰

⁸⁷ [1971] 1 W.L.R. 1176, [1971] 3 All E.R. 163.

⁸⁸ For a criticism see L.J. Kovats. International Contracts of Employment. 121 New L.J. 734 (1971).

⁸⁹ [1988] 1 Lloyds Law Rep. 191.

⁹⁰ Ibid at p.192.

On the facts of the actual case it was held that the "stringent"⁹¹ application of public policy was of first importance because commercial fraud was on the increase which made it imperative that the court should refuse to allow a party to rely on a contract which was designed to deceive third parties.

Kahn-Freund⁹² suggests that a doctrine of relativity of public policy is applied by the courts. By this he means that the foreign law will be examined in the context of the case at bar in order to establish whether or not it will produce unacceptable results in the actual case. If this is in fact what courts do then it is a clear exception, as Prebble⁹³ notes, to the usual rule of jurisdiction selection rather than rule selection observed by English courts.

Finally in the English context it must be noted that as with New York, courts will recognise foreign public policy and not merely consider the public policy of the forum.

A well known case of deference to foreign public

⁹¹Ibid at p.194.

⁹²O. Kahn-Freund. Reflections on Public Policy in the English conflict of Laws, (1953) 39 Grotius, 39.

⁹³Prebble at p.466.

policy is Regazzoni v. K.C. Sethia Ltd.⁹⁴ a decision of the House of Lords. The case concerned a contract for the sale of jute sacks which were to be transported from India via an Italian port to South Africa. Indian law prohibited the exportation of jute to South Africa. Even though the parties had agreed that English law would govern the defendant's refusal to perform the contract was held justified by the House of Lords. Viscount Simonds stated:

"Just as public policy avoids contracts which offend against our own law, so it will avoid at least some contracts which violate the laws of a foreign state, and it will do so because public policy demands that deference to international comity."⁹⁵

The case can of course be interpreted as applying the English public policy consideration which is not to prejudice good relations with foreign powers. Indeed it is possible to interpret Viscount Simonds dictum above ⁹⁶ to suggest that it is ultimately the forum's public policy that is being applied. 'International comity' can be emphasised rather than the foreign public policy.

⁹⁴[1958] A.C. 301.

⁹⁵Ibid at p.319.

⁹⁶Ibid.

Public Policy as an Exception to the Principal of Party
Autonomy in England

"English law accords to the parties to a contract a wide liberty to choose the proper law... The English courts will give effect to their choice unless it would be contrary to public policy to do so."⁹⁷

It is difficult to know here what amounts to public policy. Considerations noted above are relevant, however there are very few cases which consider this specific point. Golden Acres Ltd. v. Queensland Estates Pty⁹⁸ may be cited here. The court said that

"whilst appreciating that public policy can be an unclear concept, generally speaking it would be contrary to public policy for the legislative intention to be stultified by parties to a contract, of which the proper law would be Queensland, selecting some other law for the purpose of avoiding the application of Queensland law."⁹⁹

General Conclusion

In both English and New York courts public policy has been stated to be a limitation on party autonomy. However it is very infrequently used in either of the two jurisdictions to defeat a choice of law clause. It is a concept which is very difficult to define in anything but very general terms. "One of the frustrating, but at the same time fascinating, aspects of conflict of laws is that so

⁹⁷Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime S.A. [1971] A.C. 572.

⁹⁸(1969) St. R. Qd. 378.

⁹⁹Ibid at pp.384-5.

many of its areas are as yet comparatively unexplored."¹⁰⁰ However perhaps its inherent greyness may be useful in this area of choice of law. The matter is taken up further below.¹ At this point it may be concluded that public policy exists as a potential tool to limit or override a choice of law clause which in all the circumstances greatly offends the forum in some way and for some reason. As a safeguard it seems an appropriate concept to employ. It is sufficiently general to be applicable in any situation that might arise and provided the concept is not abused (and there is no evidence that this has happened in England or New York or why it should in New Zealand) it should be used as an exception to party autonomy. Indeed one writer considers that "it is no use trying to exorcise public policy, it will, like nature, always come back, even if you drive it out with a pitchfork....."²

It is however suggested that only forum public policy should be considered. Cases such as Southern Intern. Sales v. Potter & Brumfield Div. of A.M.F. Inc.³ which consider the public policy of a state which has not been chosen and which is not the forum make for uncertainty by widening the appli-

¹⁰⁰W.L.M. Reese. Power of Parties to Choose Law Governing their Contract. 84 Proceedings. Am. Soc. of Int'l Law 49 at p.55 (1960).

¹See infra at p.485 et seq.

²Kahn-Freund op. cit. supra n.92 at p.81.

³410 F. Supp 1339 (1976).

cation of the concept beyond an acceptable degree.⁴

⁴This is considered in greater detail in the context of mandatory rules and the European Economic Convention on the Law Applicable to Contractual Obligations (1980) discussed *infra* at p.400 et seq.

3. The English Limits on Party Autonomy ⁵

Whilst this has received much academic interest there is no direct English authority on this matter. There has however been much incidental discussion.⁶ If any general principle emerges from these cases it is that the parties' choice is subject to the qualifications of legality, bona fides and public policy.

It has been argued that the requirements of legality begs the question,⁷ and the term bona fide is not free from doubt. The importance of the public policy requirement is discussed below. The first matter to consider are the words 'bona fide' and 'legal'.

Bona fide and legal limitation

It is stated in England that the choice must be 'bona fide and legal'⁸ although 'connection with English law (i.e. the chosen law) is not as a matter of principle essen-

⁵See supra at p.35 et seq.

⁶R. v. International Trustee for the Protections of Bondholders Akt [1937] A.C. 500. Vita Food Products Inc. v. Unus Shipping Co. Ltd. [1939] A.C. 277; Mount Albert Borough Council v. Australasian Temperance & General Mutual Life Assurance Society Ltd. [1938] A.C. 224; Re Helbert Wagq [1956] Ch. 323; Boissevain v. Weil [1949] 1 K.B. 482; The Fehrman [1938] 1 W.L.R. 159; Tzortis v. Monarch Line A/B [1968] 1 W.L.R. 406; James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd. [1970] A.C. 583; Cie Armement Maritime S.A. v. Cie Tunisienne de Navigation S.A. [1971] A.C. 572.

⁷J.H. Beale. What Law Governs the Validity of a Contract? 23 Harv. L.R. 1 at p.260 (1909-1910), and Morris & Cheshire. The Proper Law of a Contract. (1940) 56 L.Q.R. 320 at pp.335-5.

⁸Vita Food Products Inc. v. Unus Shipping Co. [1939] A.C. 277 at p.290 per Lord Wright.

tial'.⁹ Precisely what is meant by bona fide and legal is not clear. Whatever the intended scope is, it must be seen as a limit on party autonomy. Possibly Lord Wright merely meant that the choice should be reasonable and not evade some important law that would otherwise apply. Graveson¹⁰ suggests that a 'bona fide' choice is one that is normal in the type of business transaction; he has also pointed out that in England there is no general doctrine of evasion of law.¹¹ Today there are still no cases where the court has held that the choice of law has been evasive.¹² Should the parties intend to apply a law in order to evade some mandatory provisions of that legal system with which the contract is most closely connected then Dicey & Morris¹³ contend that no English court would uphold the choice. They consider that the 'bona fide and legal' requirement is "fundamental" and means much more than that a "merely 'eccentric' or 'capricious' choice of law is of no effect."¹⁴ The explanation they give to

⁹Ibid.

¹⁰R.H. Graveson. The Proper Law of Commercial Contracts as Developed in the English Legal System in Lectures on the Conflict of Laws and International Contracts 1, (U. Mich. Law School Summer Inst. on the Int'l & Comp. L. ed. 1949) at p.24.

¹¹R.H. Graveson. The Doctrine of Evasion in the Law of England & America. (1937) 19 J. Comp. Leg. 21.

¹²"An evasive choice of law is unreal and unreasonable and therefore without effect." Dicey & Morris at p.756.

¹³Dicey & Morris at p.755.

¹⁴Ibid.

the words 'connection with English law is not as a matter of principle essential' is that Lord Wright was merely referring to England's importance as a commercial nation and the fact that parties often wish English law to govern their dealings, and so Lord Wright considered it reasonable in this situation to stipulate English law to govern. Thus it may be argued that the significance of the Vita Food case is restricted to those situations in which the parties have chosen a law connected by practice and tradition with the type of transaction into which they have entered.¹⁵ Dicey & Morris argue that whilst Vita Foods is not authority for the selection of a law other than English law¹⁶ there is no reason in principle why it should not apply to an express and reasonable choice of e.g. French law as the proper law of a contract not visibly connected with France.¹⁷

In New York the problem of evasion would presumably not arise, because on Dicey & Morris's definition of an evasive choice, it would be unreasonable and would therefore fail on the reasonable relation¹⁸ test which at present is part of both New York common law and the New York

¹⁵Ibid.

¹⁶Dicey & Morris at p.757 point out that whilst the law of Nova Scotia and not that of England was the *lex fori*, the conflict of laws principles were in substance those of English law and that Lord Wright thus merely expressed a view of the choice of English law to be taken by a judge applying English conflicts rules.

¹⁷Ibid.

¹⁸See *supra* at p.220 et seq. and pp.271-2.

Uniform Commercial Code.

It may be argued that if a choice was evasive it could be struck down on grounds of policy which is discussed below.¹⁹

Finally in the English context is the putative proper law doctrine. This is a limit on party autonomy. It will be recalled²⁰ that in the eyes of its exponents the concept simply means that any express choice is to be disregarded and the applicable law is to be determined by reference to the third rule of the Proper law.

Fortunately the putative proper law has not been taken up by the courts; judges have not employed the concept; Lord Diplock went so far as to consider it "confusing" in one decision.²¹

It is suggested that if the parties have made a choice of law decision then that law should determine both the question of where a contract is made and whether the contract is validly concluded. There is nothing illogical

¹⁹See *infra* at p.485 et seq.

Under Title 14 discussed *supra* at p.257 which does not have a reasonable relation test a non New York court could possibly consider a choice of New York law as evasive if it had the affect of avoiding an otherwise applicable law although of course the party relying on New York would always contend the choice was not unreasonable as he wanted to rely on the sophistication of the New York legal system.

²⁰*Supra* at p.73 et seq.

²¹Mackender v. Feldia[1967] 2 Q.B. 590 at p.603.

in referring these matters to the law chosen by the parties. The forum allows the parties to choose a law to govern their contract. It seems reasonable to say to parties that this is the law you have chosen; as the forum, we allow you your choice and we shall now judge the issues by your choice of law. If the result is that there is not a valid contract this is unfortunate; the parties should have considered the implication of their choice beforehand and if the matter is being litigated one party presumably will be pleased that the contract is not valid.

To allow party autonomy makes for certainty and simplicity, to add requirements (of legality and bona fide) merely confuses. Public policy as discussed below²² suffices.

²²See *infra* at p. 489 et seq.

4. Reasonable Relationship Limitation

This is a requirement that exists in New York by virtue of the Uniform Commercial Code and pursuant to common law. It does not apply to large commercial transactions.²³ The disadvantages of this limitation have been discussed elsewhere.²⁴ Whilst New York may consider it a necessary requirement in order to control the amount of litigation coming before its very busy courts this would not be an argument that applies in New Zealand. Because of its disadvantages, and because it is not a logical limitation on party autonomy and as there are no practical advantages for adopting such a limitation it is considered an inappropriate limitation for this country to adopt.

A closely allied question is whether the parties will be permitted to choose the law of a state which has no connection with the contract. English law requires no such connection and despite some earlier academic views to the contrary,²⁶ the Restatement (Second)²⁷ and New York case law²⁸ clearly take the view that convenience and

²³Discussed supra at p.257 et seq.

²⁴Discussed supra at p.289 et seq.

²⁵Vita Food Products Inc. v. Unus Shipping Co. [1939] A.C. 277 at p.290 per Lord Wright.

²⁶E.g. Cheshire writing in the 1940's. See Cheshire at p.39 et seq.

²⁷Restatement (Second) Conflict of Laws. S.187 Comment f at p.566-567.

²⁸See cases cited supra at p.270 et seq.

good sense require this view.

Thus neither a reasonable relationship requirement nor a connection with the chosen law is advocated.

5. The Contract must be connected with two or more jurisdictions

Party Autonomy as used in this thesis is a doctrine of conflict of laws. It can therefore have no application in a completely domestic contract. Unless two or more jurisdictions are involved the parties cannot choose a foreign law to govern their obligations; they may of course incorporate foreign rules of law into their transaction but this is a question of construction. It is not a conflict of laws problem.

6. Third Parties not Generally Affected

Generally speaking the rule is that choice of law clauses may only affect the parties to the contract. The Uniform Commercial Code 1-105(1) uses the words 'the parties' and 'their agreement'; and the areas which Section 1-105(2) exclude from the party autonomy of Section 1-105(1) are those in which a third party is likely to become involved.

This is another limit on party autonomy. In England and New Zealand the doctrine of privity would apply to achieve the same result in situations where English or New Zealand law was the proper law of the contract, and the burden aspect of privity was involved.²⁹

Th s New York law and English law are similar in this respect.

²⁹Third parties could be affected if the benefit aspect of privity was involved. See e.g. Section 4 The Contracts (Privity) Act 1982 (N.Z.)

7. Constitutional Limitations on Party Autonomy

It is beyond the scope of this thesis to consider the constitutional limits on party autonomy in the United States. Much obviously has been written on the subject in America. However the problems in this area are not relevant to New Zealand and except for brief reference to the problem in connection with Title 14 above³⁰ the matter is not considered further.

³⁰Supra at p.262 et seq.

8. Meaningless choice of law clauses will be disregarded or altered

This limitation on party autonomy may be illustrated by the House of Lords decision of Compagnie D'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A.³¹

The case involved a contract for the transport of oil between two Tunisian ports. Clause 13 of the agreement provided that "this contract shall be governed by the laws of the flag of the vessel carrying the goods ...". However it transpired that a number of boats were used involving the flags of France, Liberia, Norway, Sweden and Bulgaria.

Lord Reid³² said that in the circumstances clause 13 must be regarded as having failed in its purpose to determine the proper law of the contract. Therefore the parties' intentions were no longer a matter of concern and he applied the third rule to find the proper law of the contract, and held that French law was the system of law which was most closely connected with the contract.

This approach of disregarding a meaningless choice may be contrasted to the judgments of Lord Diplock³³ and Lord Morris³⁴. These two judges construed Clause 13 to

³¹[1971] A.C. 572.

³²Ibid.

³³Ibid at p.601.

³⁴Ibid at p.504

give effect to the parties' intent; Lord Diplock held that Clause 13 meant "this contract shall be governed by the law of the flag of the vessels of the owners, except... etc." Lord Morris pointed out that it would be the owner's vessels which would primarily be the vessels carrying the oil. This latter approach of Lords Diplock and Morris has the great advantage of not destroying bargains, although on the facts of the case both approaches had the result of applying French law as the governing law.

It is suggested that only clauses that can be given no sensible meaning whatsoever should be ignored; this is in keeping with the general principle that party autonomy must and should prevail.

9. Limitations on Choice of Jurisdiction

After a period of uncertainty³⁵ it now seems clear that English courts require the parties to choose a definite municipal system of law to govern their contract.³⁶ Thus parties may not choose public international law to govern nor the "general principles of law recognised by civilised nations."³⁷

Whilst Wood, writing at the beginning of this decade, thought that public international law could be chosen³⁸ the recent House of Lords decision of Amin Rasheed Shipping

³⁵See D.G. Pierce. Past Formation Choice of Law in Contract. (1987) 50 M.L.R. 170 at pp.190-1.

³⁶Pierce *ibid* and see Webb & Brown at p.332 n.4. M. Wolff. Private International Law.(2nd edit.)(1980) at p.417.

³⁷For a contrary view see P. Wood. Law and Practice In International Finance (1980) at p20. and P. Wood. External Governing Law. Either a Fortress or a Paper House. (July 1982). Internat. Fin. L.R. 11. Wood cites a number of decisions which hold that the "general principles of civilised law" can be chosen. In B.P. v. Libya (1.L.R.) 297 (1979) it was held that the general principles of law recognised by civilised nations" was valid. In Petroleum Development (Trucial Coast) Limited v. The Sheikh of Abu Dhabi (1.L.R. 1951)(Case No. 37). Lord Asquith applied the "principles rooted in the good sense and common practice of the generality of civilised nations" (described by Wood at p.21 as a "sort of modern law of nature"). For other examples see Wood, *ibid* at p.21.

³⁸Wood *supra* n.37 at p.20 et seq.

Corp. v. Kuwait Insurance Co.³⁹ would seem to have settled the controversy.⁴⁰ Lord Diplock pointed out that contracts are incapable of existing in a legal vacuum.

"They are mere pieces of papers devoid of all legal effect unless they are made by reference to some system of private law which defines the obligations...."⁴¹

The House of Lords explicitly rejected the notion of the "internationalised contract" governed by a set of general principles derived from public international law.

In view of the difficulties in proving this type of international law party autonomy should be limited to a choice of a municipal system of law.⁴²

It has been suggested⁴³ that parties are not at liberty to subject their contract to a legal system which is no longer in force or to a draft of a foreign code or to a system which they have freely invented. Thus to

³⁹[1984] A.C. 50.

⁴⁰Cf. Deutsche Schachbau und Tiefbohrergesellschaft mbh v. Ras Al Khaimah Oil Co. Ltd. & Shell International petroleum Co. Ltd. [1987] 2 Lloyds Law Rep. 246 at p.254.

⁴¹[1984] A.C. 50 at p.65.

⁴²Alternatively it has been suggested that a supra-national law exists in so far as, for example, the Treaty of Rome, established the E.C.C. which has led to the establishment of a new type of international law. See U.P. Toepke. Legal Aspects of International Investment. Section 25. Handbook of International Business.

⁴³Wolff op. cit. supra n.36 at p.417.

subject one's contract to the laws of Moses and Israel is unacceptable.⁴⁴

In one American case⁴⁵ the court explained that if the parties chose the Code of Hammurabi⁴⁶ to govern their contract the court would not uphold it because it would have no value as a precedent. The court explained that the production of precedent was a major function of judicial decision making and that courts may disregard stipulations by litigants concerning the content of the law for failure to promote this judicial function.⁴⁷

Webb & Brown note that to allow the parties to invent their own law would be 'tantamount to giving them the authority of sovereign legislatures'⁴⁸ and the practical disadvantages of allowing the other possibilities above are obvious. The difficulties of establishing and applying any of these 'laws' could far outweigh any possible advantages. However against this it must be remembered that the parties can include any terms they want in a contract,⁴⁹ and statutes can in general be contracted out of,

⁴⁴Hurwitz v. Hurwitz 215 N.Y.S. 184 (2d. Dept. 1926).

⁴⁵Lloyd v. Loeffler 694 F. 2d. 489 (7th Cir. 1982).

⁴⁶Ibid at p.495. The Code of Hammurabi was a set of laws prepared by a Babylonian king and was amongst the earliest bodies of law in human history. Blacks Law Dictionary 644 (1979) (5th edit.) at p.644.

⁴⁷Ibid.

⁴⁸Webb & Brown at p.332 n.4.

⁴⁹Subject to some general exceptions such as public policy.

which in effect means that parties are making their own law. If the parties can establish with sufficient clarity the terms of the contract there is no reason why these terms should not prevail. The Code of Hammurabi could be applied.

A related question is whether parties may freeze the law at the time of contracting in so far as it affects their contract. Some writers⁵⁰ and the cases⁵¹ suggest that in England this is not possible. It does follow logically that if one cannot choose a defunct system then one cannot freeze the law because to do so would involve applying a law that had become defunct. Repealed or amended rules are no longer part of the law of a sovereign state. Such 'freezing' clauses have also been criticised because they show distrust in the ability of the country whose laws are 'frozen'.⁵²

Similarly in New York the applicable law changes with changes in that law, however there are cases suggesting that it is possible to freeze the law.⁵³

⁵⁰Wolff op. cit. supra n.36 at pp.416-7.

⁵¹The cases generally cited are Re Chesterman's Trust [1923] 2 Ch. 466. In re Helbert Wagg & Co. [1956] 1 Ch. 323 and Cummings v London Bullion Co. [1952] 1 K.B. 327. See Prebble at p.520, Wolff op. cit. supra at p.417 and Webb & Brown at p.332 note 4.

⁵²See K. Mettälä. Governing Law Clauses of Loan Agreements in International Project Financing. (Winter 1986) 20 Int'l Lawyer 219 at p.235.

⁵³Brown v. Utica Mutual Insurance Co. 53 N.Y.S. 2d. 760 (Sup. Ct. 1945).

Mann⁵⁴ has suggested that the reason for limiting party autonomy to the choice of a living body of law has arisen because

"Every system of private international law ... even the idea of the autonomy of the parties exists only by virtue of a given system of municipal law."⁵⁵

If a clause has to be enforced it is by virtue of a municipal law that this happens. Therefore it is only logical that if one is making a choice of law decision one limits one's choice to a living law that will be able to resolve contractual issues.⁵⁶ Lord Diplock in the Amin Rasheed decision has given judicial support to this view.⁵⁷

⁵⁴F.A. Mann. *Lex Facit Arbitrum in International Arbitration*, *Liber Amicorum for Martin Domke* (ed. P. Sanders) (1967) at p.157 and pp.159-60.

⁵⁵*Ibid.*

⁵⁶Some writers especially in Europe hope for the development of some international trade law. Discussed by Prebble at p.517 et seq.

⁵⁷Amin Rasheed Shipping Corp. v. Kuwait Insurance Co. [1984] A.C. 50 at p.65. See *supra* at pp.353-4.

10. Party Autonomy Limited to the Substantive law of the Chosen Jurisdiction. No Renvoi.

When parties stipulate a law to govern their contract they could intend that the substantive or domestic law of the chosen state govern or they could be intending that the whole law operates and this includes the relevant state's choice of law provisions.

Usually parties would only consider the former for

"It would clearly be absurd to argue that where the parties have intended application of a foreign law they have also intended application of those rules of the 'whole' foreign law which deny their own applicability by referring to another law. Such reasoning would deny effect to the very intention that it invokes."⁵⁸

However in so far as some parties may have had the whole law in mind the fact that renvoi has no place in contract conflict of law can be seen as a limit on party autonomy. The English and New York law on this point is considered separately.

The English View

In England renvoi has no role to play in contract law.⁵⁹ This was recently affirmed by Lord Diplock in Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.

⁵⁸A.A. Ehrenzweig. *Treatise on the Conflict of Laws*. (1962) at p.338.

⁵⁹Lord Wright in Vita Food Products v. Unus Shipping Co. Ltd. [1937] A.C. 277 at p.292 could conceivably have been attempting to introduce renvoi into contract cases when he said "Hence English rules relating to conflict of laws must be applied to determine how the bills or lading are affected..." However no subsequent English case or academic has suggested that the Vita Foods case is authority for the existence of renvoi in England. See Morris & Cheshire. *The Proper Law of a Contract*. (1940) 56 L.Q.R. 320, at pp.333-4, and J.D. Falconbridge. *Renvoi in New York and elsewhere*. 6 Vand. L. Rev. 708 (1953). In 1960

when he said⁶⁰

"It is the substantive law of the country which the parties have chosen as that by which their mutually legally enforceable rights are to be ascertained, but excluding any renvoi, whether by remission or transmission that the courts of that country might themselves apply if the matter were litigated before them."⁶¹

New York View

New York case law⁶² following the Restatement (Second) Conflict of Laws⁶³ comes to the same conclusion as that held in England.

However academic writers are not united against the application of renvoi as they are in England. Whilst some⁶⁴ consider the introduction of renvoi as not only "impractical" but "preposterous" others consider it a possibility⁶⁵ and one writer considers it "essential".⁶⁶

the English Court of Appeal unanimously affirmed In re United Railways of the Havana v. Regla Warehouses [1960] Ch. 52 that renvoi did not apply.

⁶⁰[1984] A.C. 50.

⁶¹Ibid at p.62.

⁶²E.G. Reger v. National Association of Bedding Manufacturers etc. 372 N.Y.S. 2d. 97 (1975). The United States Court of Appeal likewise rejected renvoi in Siegelman v. Cunard White Star Ltd. 221 F. 2d. 189. (2d. Cir. 1955).

⁶³Restatement (Second) Conflict of Laws Sec.187(3) (1971) and Comment n to Section 187(3) at p.569.

⁶⁴M.J. Levin. Party Autonomy: Choice of Law Clauses in Commercial Contracts. 46 Georgetown L.R. 260 at p.261. (1957-58). See generally Falconbridge op. cit. supra n.59.

⁶⁵H.E. Yntema. "Autonomy" in Choice of Law. 1 Am. J. Comp. Law. 341 at p.356 (1952).

⁶⁶J.D. Engal. The Essential Role of Modern Renvoi in the Government Interest Analysis Approach to Choice of Law. 54 Temple L.Q. 237 (1981).

If interest analysis is being used by a court there is an argument for considering the whole law of all the concerned jurisdictions in order to ascertain all the relevant policies.⁶⁷ This has been recognised and a "new renvoi" has emerged.⁶⁸ Section 8 comment k of the Restatement (Second) Conflict of Laws states that

"An important objective in choice of law is to accommodate insofar as possible the interests of the states involved An indication of the existence of a state interest in a given matter, and of the intensity of that interest, can sometimes be obtained from an examination of that state's choice of law decisions."

This section allows an "unashamed perusal and assessment"⁶⁹ of the choice of law rules of other jurisdictions when interest analysis is being employed to resolve a choice of law issue.⁷⁰

⁶⁷See generally R. Cramton & D. Currie. Conflict of Laws, Cases - Comments - Questions (1968) at p.163. A. Von Mehren & D. Trautman. The Law of Multistate Problems: Cases & Materials on Conflict of Laws (1965) at pp.509-552.

⁶⁸Prebble at p.709.

⁶⁹Ibid.

⁷⁰Renvoi and '8k Renvoi' differ in two respects. 8k Renvoi automatically considers each state's conflict of laws provisions in each case. Renvoi is only considered if the other jurisdiction's law refers back to the forum or on to another forum. Secondly renvoi is considered when a choice of law has been made (by the parties or court) whilst the 8k Renvoi Approach should be considered before the forum formulates its choice of law rule for the case. See A. Von Mehren. The Renvoi and Its Relation to Various Approaches to the Choice of Law Problem in XXth Century Comparative & Conflict Law. (1961) 380 at p.390.

This 8k renvoi only has applicability if interest analysis is being applied by both the forum and the other jurisdiction. Prebble⁷¹ points out that if the other jurisdiction does not have as its approach interest analysis then it seems that no meaningful information as to that jurisdiction's interest in the matter can be found by reference to its choice of law rules.

Conclusion

It is suggested that New Zealand could do well to follow the English approach to the question of renvoi. The parties should be limited to choosing only the domestic law of a given legal system. This promotes certainty and predictability. For example in the Siegelman⁷² decision the court stated when considering the scope of the choice of law provision that

"We think the provision must be read as referring to the substantive law alone, for surely the major purpose of including the provision in the ticket (the contract of carriage) was to assure Cunard of a uniform result in litigation no matter where the ticket was issued or where the litigation arose, and this result might not obtain if the 'whole' law of England was referred to."⁷³

Secondly it has been pointed out⁷⁴ that this approach

⁷¹Prebble at p.710.

⁷²Siegelman v. Cunard White Star Ltd. 221 F. 2d. 189 (2d. Cir. 1955).

⁷³Ibid at p.194.

⁷⁴Gruson Governing Law Clauses at p.369.

saves the court from the "added burden" of determining the validity of a governing law clause under two legal systems.

Finally it may be argued that by restricting the parties' choice in this way no great exception to party autonomy emerges. It is very difficult to envisage a situation where parties would want to refer to the whole law of the chosen jurisdiction. One would assume that the overwhelming majority of persons entering contracts would not consider anything beyond the substantive law of a jurisdiction.

If the parties to a contract really did want to refer to the whole of law of another jurisdiction no great injustice is done if this wish is ignored. In Amin Rasheed Lord Diplock⁷⁵ gave the example of a contract that was made in England but which had a choice of law clause specifying that French law was to apply. The English court would apply French substantive law to it notwithstanding that a French Court applying its own conflicts rules might accept a renvoi to English law as the *lex loci contractus* if the matter were litigated before it.

Had the parties really wanted French law to apply they could have, and indeed should have considered the

⁷⁵ [1984] A.C. 50 at p.62.

consequences of their choice. By choosing French law the parties can be seen as really wanting English law to apply (given that they have considered the consequences of choosing French law). This being so they should have simply chosen English law in the first place.

Rather than hope that a court will embark on the difficult task of renvoi the parties should state which law they really want to actually apply in their fact situation. Thus in the example above had the parties really wanted English law (via French law) this should be chosen otherwise it seems eminently reasonable for the forum to simply apply the law stated in the contract, which in this example will be the substantive law of France.⁷⁶

⁷⁶In passing it may be noted that the only English case where the court interpreted the parties' choice of law clause as stipulating an express choice of renvoi the court admitted that its judgment probably defeated the intention of the parties. See Ocean Steamship Co. v. Queensland State Wheat Board [1941] 1 K.B. 402 at p.412.

11. Choice of Law Limited to Certain Issues

Party autonomy does not apply in the field of capacity to contract in English law. It will be recalled⁷⁷ that the parties may not arrange their affairs in such a way as to confer capacity upon themselves by a choice of law clause. The prevailing English view is that this would be unrealistic.

However the Restatement (Second) Conflict of Laws Section 198(1) and 198(2) states that the capacity of a party to contract is determined by the law selected by application of the rules of Sections 187-188, and "the capacity of a party to contract will usually be upheld if he has such capacity under the local law of the state of his domicile."

This rule means that prima facie parties may obtain contractual capacity for themselves by a choice of law clause. However the public policy limitation may well play a greater role here than for other issues.⁷⁸

The practical reason for not allowing party autonomy to prevail is that a party could confer capacity upon himself by choosing a certain system of law. From a theoretical point of view one may argue that contractual capacity is a factor determining the validity of a contract

⁷⁷Prebble at p.675.

⁷⁸See supra at p.97 et seq.

and should be judged according to contract law rather than viewed as a question of a person's status.

Party autonomy should be upheld subject to a statute expressly stating that it was to apply rather than the parties' choice of law or was interpreted to necessarily imply such. If one may not enter into a contract until one is 21 years of age in Ruritania⁷⁹ then if New Zealand is the forum it could uphold party autonomy and allow the choice of Ruritanian law if on the facts this appeared acceptable. Alternatively if the facts were such that it appeared that the Ruritanian should be held to his contract New Zealand legislation could be applied to the question of capacity. The choice of Ruritanian law would still be upheld for all other issues. In the latter situation the New Zealand legislation on minors would be seen as "overriding."⁸⁰ The Act would be interpreted as requiring application no matter what the parties' choice of law was. This should however be the exceptional situation. Party autonomy in general should prevail.

Whilst there appears a marked divergence here between England and New York in this matter it might well be that the Restatement approach is closer to the English law than would first appear. The proviso in comment b⁸¹ to

⁷⁹An altered example of Morris' example 1 on p.286. The Ruritanian in question should be under 21 years of age and the contract contain a choice of law clause specifying Ruritanian law to govern.

⁸⁰Discussed supra at p.311 et seq. An overriding statute is one which applies or overrides all else.

⁸¹At p.632.

Section 198 of the Restatement (Second) makes the point that rules of capacity frequently embody a sufficiently strong policy to warrant their application under the circumstances stated in Section 188 to the "sacrifice of that choice of law principle which favours application of a law which would uphold the contract in order to protect the justified expectations of the parties."

Thus one may state that in England capacity is an area where the parties may not make a choice and in America whilst general contract conflict of rules apply a choice of law clause conferring contractual capacity may well be scrutinised more carefully than in other areas.

It is suggested that there is no reason why party autonomy should not prevail in this area of law, subject to overriding statutes in force in the forum, nor why the *lex fori* should not prevail absent such choice.⁸²

⁸²This was discussed *supra* at p. 98 et seq.

12. Parties may not choose a law to govern procedure

Parties may not choose a law to govern procedure.

These questions are universally governed by the lex fori.⁸³

It would be quite impractical to allow otherwise.

⁸³H.E. Yntema. Autonomy in choice of Law. 1 Am. J. of Comp. Law 341 at p.353 (1952). For England see Morris at p.453 et seq.
For New York see M. Gruson. Legal Aspects of International Lending in Handbook of International Business (1982) at 27.18.

13. The Parties must both agree on the choice of law Clause

(The Problem of Adhesion Contracts and Party Autonomy)

With the advent of modern legislation designed to protect the weaker party⁸⁴ a problem arises with party autonomy and so called adhesion or standard form contracts.⁸⁵

"While parties should not be precluded from seeking predictability and uniformity by stipulating their choice of law, unilaterally imposed provisions ... should not be enforced unless the party urging enforcement provided the other ... with knowledge of what was intended."⁸⁶

If courts do not uphold governing law clauses because the contract is one of adhesion then party autonomy is severely limited.

Fricke v. Isbrandtsen⁸⁷ may be used to illustrate the problem. Should the German plaintiff be bound by

⁸⁴See generally P.S. Atiyah. The Rise and Fall of Freedom of Contract. (1979). J.G. Sauveplanne. Consumer Protection in Private International Law (1985) 32 Netherlands Int'l L.R. 100.

⁸⁵Fricke v. Isbrandtsen 151 F. Supp. 465 at p.468 (1957).

⁸⁶Contracts of adhesion have been defined as "agreements to which one party's participation consists in his mere adherence unwilling and often unknowing, to a document drafted unilaterally and insisted upon by what is usually a powerful enterprise." A.A. Ehrenzweig. Adhesion Contracts in the Conflict of Laws. 53 Colum. L. Rev. 1072 at p.1075 (1953). A 'Standard Form' Contract is the equivalent English term. Standardised Contracts is another term employed.

⁸⁷151 F. Supp. 465 (1957). A 'ticket' case. A German plaintiff bought a ticket printed in English, a language she could not understand. She later suffered injury at sea.

a choice of law clause which had the result of barring her action when the terms of the contract were in English? Although she had time to get the contract translated she did not avail herself of this possibility. However the court did not give effect to the governing law clause.

The case has been interpreted in a number of ways⁸⁸ which itself suggests that a number of solutions exist here.

One solution advocated by some American writers⁸⁹ is to divide contracts into two groups. Party autonomy could apply to non-adhesion contracts whilst special rules could apply to all other contracts. For example the European Convention on the Law Applicable to Contractual Obligations (1980)⁹⁰ singles out certain types of adhesion contracts for special treatment with the object being to protect the weaker party.

⁸⁸Prebble at p.513 et seq. notes that the court did not say that the clause was invalid, he considers that the court simply ignored the choice of law clause. Gruson Governing Law Clauses at p.359 et seq. analyses the case in terms of public policy. See also Note. Determining the Scope of Choice of Law Provisions in Steamship Tickets: Adhesion Contracts and the Conflict of Laws. 65 Yale L.J. 553 (1956). Note, Party Autonomy Limited by strong Public Policy of State of Dominant Interest. 58 Colum. L.R. (1958).

⁸⁹E.g. Ehrenzweig & Yntema. See supra Yntema op. cit. supra n.83 at p.353.

⁹⁰Articles 5 and 6. See Appendix A pp.551-552.

Yntema⁹¹ has produced what he considers to be a non exhaustive list of illustrations which include contracts of insurance and employment. The list concludes with "other types of transactions" which illustrates the difficulty inherent in classifying contracts into groups.

The approach is not recommended because there will always be a number of contracts which are borderline cases. Classifying contracts into groups is just too difficult to be of practical use.

The Restatement (Second) Section 187 comment b⁹² suggests that choice of law clauses in contracts are usually respected but that the forum will scrutinise such contracts with care and not enforce a clause if to do so would result in substantial injustice to the adherent. This is a more general test, it is not too vital to make a distinction between adhesion and non adhesion situations. Rather party autonomy may be seen as the rule with a public policy limitation applying.

A very similar approach has been to consider governing law clauses as valid generally in all contracts absent "fraud, undue influence, or overweening bargaining power."⁹³

⁹¹Yntema op. cit. supra n.83.

⁹²At p.562.

⁹³The United States Supreme Court had applied this test to forum selection clauses in The Bremen v. Zapata Offshore Co. 407 U.S. 1 at p.12 (1972). Gruson supports this approach. See Gruson Governing Law Clauses at p.360.

This approach has the advantage of retaining party autonomy yet provides an escape avenue for contractual victims who for one reason or another are to be absolved from their bargains.

One other approach has the same satisfactory consequence. This approach emphasises the consent aspect of contract law. The parties must agree to a choice of law clause. If one party is unaware of the choice of law clause and is not negligent⁹⁴ or if he has been induced to enter the contract by fraud, undue influence or overweening bargaining power it may be argued that he has not in fact agreed to a choice of law clause.⁹⁵ This approach has been criticised on the grounds that few adhesion contracts involve consent defective according to traditional criteria of contract law.⁹⁶ On the other hand this criticism can be seen as an advantage of the approach. The general rule should be in favour of party autonomy and only in exceptional circumstances should a party be able to convince a court that the choice of law clause should not apply. He should be able to show that his lack of consent was defective according to the criteria

⁹⁴A non est factum situation.

⁹⁵This argument was considered in the context of the New York Uniform Commercial Code discussed supra at p.239.

⁹⁶Prebble at p.516. Prebble would thus favour the previous approach which hinged on policy considerations. Prebble, *ibid*, suggests that any choice of law clause that produces socially offensive results should be struck down as contrary to public policy.

of contract law pertaining in the forum.⁹⁷

Either of these two approaches would overcome any difficulty in resolving adhesion contracts in a legal system that advocated party autonomy.

However by way of conclusion it is argued that this problem is not as grave as perhaps some writers would suggest. The English courts have yet to throw out a single transnational contract on the ground that there has been an abuse of bargaining power. This could possibly be due, in part, to a changing attitude towards such concepts as unequal bargaining power and unconscionability which has arisen since contract law has been analysed in economic terms.⁹⁸

Posner argues that many contracts are offered on a take it or leave it basis and that this is only "sinister"⁹⁹ if one party does so because he knows that the other party has no choice but to accept. On an economic analysis of law the standard form is explicable on grounds of convenience and lack of cost. Unless one party has a monopoly then the other party has an option not to enter

⁹⁷For example, in both America and England if the choice of law clause is obtained by fraud then it is unenforceable. See Nakhleh v. Chemical Constr. Corp. 359 F. Supp. 357 (S.D.N.Y. 1973). Freedman v. Chemical Constr. Corp. 43 N.Y. 2d. 260, 401 N.Y.S. 2d. 176, (1977).

Restatement (Second) Conflict of laws Section 187 Comment c at p.563 (1977).

⁹⁸For example see R.A. Posner. *Economic Analysis of Law.* (1977) (2nd edit.) at p.84 et seq.

⁹⁹*Ibid* at p.85.

into the contract and this applies to all types of adhesion contracts. The plaintiff in Fricke v. Isbrandtsen¹⁰⁰ could have gone on another liner operated by a different company. The Isbrandtsen company was not the only liner operating between Germany and America.¹

Posner suggests, therefore, that the concept of "unequal bargaining power" is neither fruitful nor meaningful. He continues by saying that if unconscionability means that a judge may nullify a contract because of inadequate consideration or otherwise one-sided terms then the basic principle that courts are not to be judges of business matters is compromised.

"Economic analysis ... reveals no ground other than fraud, incapacity or duress (the last narrowly defined) for allowing a party to repudiate the bargain that he made in entering into the contract."²

Likewise a party should not be able to repudiate his choice of law clause unless fraud, incapacity or duress is involved. The duress could be economic duress, following general contractual principles. If any of these situations exist there will be lack of consent and therefore no true agreement on a choice of law clause. Alternatively the choice could be rejected on public policy grounds.

¹⁰⁰151 F. Supp. 465 (1957).

¹Mrs. Fricke could have chosen the Cunard White Star Line, as did the Siegelmans.

²Posner op. cit. supra n.98 at p.87.

Conclusion

Contracts should not be divided into adhesion contracts and non adhesion contracts. Parties must truly agree on a choice of law clause. If fraud, undue influence, overweening bargaining power or duress is involved when the choice of law clause decision is made then the parties do not agree. Such a choice could be struck down on public policy grounds. Before a New Zealand court refused to uphold party autonomy the ground for acting so would have to amount to lack of consent according to domestic contract law.

14. Limitations on Party Autonomy Relating to time of choice and number of possible choices.

".... the drafting of this clause appears to contemplate that the proper law of the contract may float until exercise of an option by the insured. But this is not a concept to which an English court could give effect, since the rights and obligations of contracting parties crystallize when a contract is made (subject to consensual variation thereafter) and contracts can only crystallize with reference to an existing proper law since they cannot exist in a legal vacuum."³

English courts⁴ will not enforce a governing law clause whereby the law chosen is made to depend upon some future event.⁵ For example in The Iran Vojdan⁶ the choice of law clause stated that at the option of the carrier either Iranian law or German law or English law could govern the contract. Bingham J. held that

³Du Pont v. Agnew [1987] 2 Lloyds Law Rep. 585 at p.592 per Bingham J.

⁴E.g. see Armar Shipping Co. Ltd. v. Caisse Algerienne d'Assurance et Reassurance [1980] 2 Lloyds Law Rep. 450. Black Clawson Int'l Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G. [1981] 2 Lloyds Law Rep. 446, Dubai Electricity Co. v. Islamic Republic of Iran Shipping Lines (The "Iran Vojdan") [1984] 2 Lloyds Law Rep. 380, Cantieri Navali Riuniti Spa v. N.V. Omne Justitia (The Stolt Marmaro) [1985] 2 Lloyds Law Rep. 428.

⁵See generally V. Danilowicz. 'Floating' Choice of Law Clauses & their Enforceability. (Summer 1986) 20 The Internat. Lawyer 1005. D.G. Pierce. Post-Formation Choice of Law in Contract. (1987) 50 M.L.R. 176. A. Briggs. The Validity of "floating" choice of law and jurisdiction clauses. (1976) Lloyds Maritime & Commercial L.Q. 508.

⁶Dubai Electricity Co. v. Islamic Republic of Iran Shipping Lines (The Iran Vojdan) [1984] 2 Lloyds Law Rep. 380.

as a matter of English law it was "clear and not disputed that this clause in the bill of lading is bad insofar as it envisages what may be called a 'floating proper law'."⁷ Bingham J. based his conclusion on The Armar⁸ where the English Court of Appeal had pointed out that there must be a governing law for every contract at the time of its making.

Megan L.J. in the latter case stated:

"The governing law cannot fall to be decided, retrospectively, by reference to an event which was an uncertain event in the future at the time when the obligations under the contract had already been undertaken, had fallen to be performed, and had been performed. Nor is it, I think, an attractive, or a possible, concept of English private international law that the governing law, initially being, say the law of Algeria, should thereafter change into the law of England."⁹

It is however unclear whether the law of the forum or the proper law of the contract determines the validity of a floating law clause.¹⁰ There appear to be no reported cases on either side of the Atlantic in which this issue has been raised. The judge in The Iran Vojdan¹¹ appeared to consider that the proper law of the contract applied, however there are arguments¹² in favour of the lex fori

⁷Ibid at p.385.

⁸Armar Shipping Co. Ltd. v. Caisse Algerienne d'Assurance et Reassurance [1980] 2 Lloyds Law Rep. 450.

⁹Ibid at p.455.

¹⁰See Briggs op. cit. supra n.5 at pp.509-11 and p.517.

¹¹Dubai Electricity Co. v. Islamic Republic of Iran Shipping Lines 1984 2 Lloyds Law Rep. 380.

¹²Briggs op. cit. supra n.5 at pp.510-11.

determining the matter. Very briefly it can be stated that party autonomy is allowed within limits, and a choice of a floating law clause falls outside acceptable limits, or that such a clause is so confusing it must be struck down. Alternatively, there is no reason why the objective proper law (the third rule of the Proper law) should not determine the validity of a clause which delays the selection of a governing law. Briggs¹³ conclusion would appear to be as definite as one can be in this situation. He says that the result of the cases is that where the proper law is English a floating choice of law will be struck down. An English court regards a contract's proper law as something to be determined by reference to existing facts and any election made under a floating choice of law clause will be disregarded as facts arising after the making of the contract. Thus the proper law will be determined by the third rule of the proper law. Once the proper law is thus determined it determines the validity of the floating law unless it is accepted that the English *lex fori* treats floating law clauses as inherently void and strikes them down initially.

A somewhat easier issue concerns the choice of two laws to govern a contract.

The parties may expressly or by implication provide for two proper laws, one to be applied in one event and

¹³Ibid at p.517.

the other if that event was negatived.¹⁴ This has been considered to be good commercial sense.¹⁵

It has been pointed out¹⁶ that it is incorrect to criticise these 'floating law' clauses on the ground that they create a vacuum in so far as there is no initial governing law. The point is that the governing law at any point in time could have been determined by applying the third rule of the proper law doctrine. It has also been suggested that a choice of law clause specifying say, three national laws to choose from "is clearly less uncertain than one which makes no choice of law at all."¹⁷ Pierce concludes therefore that post-formation choice of law will not lead to uncertainty.

Given that it is correct to say that all contracts have a governing law from their inception by virtue of the court being able to determine it by the third rule of the

¹⁴Astro Venturoso Compania Naviera v. Hellenic Shipyards S.A. ("The Mariannina") [1983] Lloyds Law Rep. 13. The parties had chosen arbitration in London pursuant to English arbitration law but if it were ruled by a competent authority that this choice was unenforceable then Greek law was to apply. The court concluded that reference to arbitration in London coupled with the desire for English arbitration law to apply indicated that English law was intended as the substantive law.

¹⁵Ibid.

¹⁶Pierce op. cit. supra n.5 at p.189.

¹⁷Ibid at p.200.

proper law the only remaining problem is, whether parties having chosen one governing law, may subsequently change this law for another. The Armar¹⁸ decision is unfortunate in this respect. If party autonomy is allowed in making an initial choice of law why not when it is made later?

Article (3) (2) of the European Convention on the Law Applicable to Contractual Obligations (1980) allows the parties to indicate a choice of governing law "at any time."¹⁹ This freedom is made subject only to the qualification that such choice does not prejudice formal validity or the rights of third parties. This approach is in harmony with the concept of party autonomy and as such is preferable to the view expressed in The Armar.²⁰

Finally it should be noted that it is open to the parties to agree that one aspect of the contract shall be governed by the law of one country (e.g. the country where it was made) and another aspect by the law of another country (e.g. the country where it is to be performed).²¹ This is called *dépécage* by the French, splitting the contract in England and has been variously described in the United States as 'picking and choosing'²² 'onion

¹⁸Armar Shipping Co. Ltd. v. Caisse Argerienne d'Assurance et Reassurance [1980] 2 Lloyd's Law Rep. 4.

¹⁹See *infra* at p.416.

²⁰Armar Shipping Co. Ltd. v. Caisse Algerienne d'Assurance et Reassurance [1980] 2 Lloyd's Law Rep. 4.

²¹Dicey & Morris at pp.748-9.

²²C.Wilde. *Dépécage in the Choice of Tort Law*. 41 So. Cal. L. Rev. 329 (1968).

peeling.'²³ There must be very clear intention by the parties that they do wish to split the governing law of their contract.²⁴

The fact that *dépécage* is permitted in English law adds force to the argument above. If more than one law can govern the various parts of a contract then why, as Pierce²⁵ asks should not more than one law be allowed to govern different stages of a contract?

Conclusion

The limitations discussed under this heading which exist in English conflict of laws should not be encouraged. They are an unnecessary limitation on party autonomy. Whilst the clause in The Iran Vojdan²⁶ is admittedly "extremely unattractive"²⁷ in so far as it introduced "maximum complexity and difficulty into what could and should be a simple matter," it is nevertheless the court's duty, (as Bingham J. noted²⁸) to give a meaning to the choice of law provision if at all possible. The courts

²³R.J. Weintraub. Beyond *Dépécage*. A "New Rule" Approach to Choice of Law in Consumer Credit Transactions and a Critique of the Territorial Application of the Uniform Consumer Credit Code. 25 Case Western Reserve Law. Rev. 16 at p.18 (1974).

²⁴Dicey & Morris at p.749 and authorities cited in footnotes 10-12.

²⁵Pierce op. cit. supra n.5 on p.375 at p.199.

²⁶Dubai Electricity Co. v. Islamic Republic of Iran Shipping Lines [1984] 2 Loyds Law Rep. 380.

²⁷Ibid at p.385 per Bingham J.

²⁸Ibid.

should endeavour to uphold the parties' choice of law clauses because this makes for certainty and fulfils the parties' expectations. If no possible meaning can be given to a choice of law clause then the *lex fori* should apply on the grounds that no choice exists. This should however have to be done rarely as parties generally make intelligible choice of law decisions.

Finally it may be noted that the American approach tends towards the views of the European Convention on the Law Applicable to Contractual Obligations (1980) rather than current English law. Parties may choose a law subsequent to the execution of the contract²⁹ and *dépécage* is permissible.³⁰

²⁹See T. Brown. Notes. Choice of Law Stipulations by Litigants. 43 Washington & Lee L.R. 141 at p.141 et seq. (Winter 1986) and cases cited therein. Danilowicz op. cit. supra n.5

³⁰Restatement (Second) Conflict of Laws (1971) Section 187, Comment i at p.570. However the Restatement's paragraphs on specific contracts (paras 189-97) favour the application of a single law.

Conclusion to Limitations on Party Autonomy in
England and New York

Some of the limitations discussed are inappropriate in the New Zealand setting³¹ and others are unlikely to be of any significance from a practical point of view.³² Other limitations are clearly not necessary³³ or add confusion³⁴ to what should be a straightforward situation. Some are necessary.³⁵ Of the fourteen limitations listed above only two are obvious. Renvoi has no place in international contracts and public policy must be a tool available to the courts to strike down a choice of law clause in an exceptional circumstance.

Adhesion contracts and so called overriding statutes of the forum can be accommodated within the party autonomy rule. Parties must agree on a choice of law clause; it cannot be unilaterally imposed. Secondly legislation exists today which plainly states that it is to take precedence over choice of law decisions. This must be respected. However unless an enactment expressly states it is to apply rather than a governing law clause or its very object requires such an interpretation the basic rule of party autonomy should prevail.

³¹Constitutional limits on party autonomy.

³²Very few parties will want to subject their contract to the laws of Moses.

³³Such as the reasonable relationship requirement.

³⁴The bona fide and legal requirement.

³⁵That procedure must be governed by the lex fori.

PART D

SOME OTHER POSSIBLE SOLUTIONS

The Lex Loci Contractus Theory

The Lex Loci Solutionis Theory

A Rule of Validation: The Lex Validatis

The European Convention on the Law Applicable
to Contractual Obligations 1980

PART DSome Other Possible Solutions

The point has now been reached where the law relating to choice of law issues for interstate and international contracts has been stated and criticised in the English and New York jurisdictions.

Before coming to any conclusions as to what New Zealand should do some other possible 'solutions' are considered. If interest analysis is too general and uncertain perhaps mechanical rules should return. Thus the *lex loci contractus* and *lex loci solutionis* theories are critically considered.

Next the *lex validatis* is discussed as a possible rule to govern this area of conflict law. This rule has been chosen as it produces a contrast to the *lex loci contractus* and *lex loci solutionis* theories and because it has received academic support on both sides of the Atlantic.

Finally a legislative example has been deemed appropriate for inclusion. Many specific pieces of legislation, actual or pending, could be discussed here. The European Economic Convention on the Law Applicable to Contractual Obligations (1980) has been chosen because it is legislation which has been designed to resolve all choice of law issues whether or not a choice of law clause exists. It is very likely to become law in England. It is considered in some detail and its

merits and disadvantages considered.

This convention contains both general rules and specific rules and is a contrast to the approaches considered in the American context.

1. THE LEX LOCI CONTRACTUS THEORY

Introduction

This theory that the lex loci contractus or the law of the place of contracting should determine the choice of law issue is first defined and considered very briefly from a historical viewpoint.

Secondly the advantages of the theory are listed and criticisms of these alleged advantages noted.

Thirdly the disadvantages of the doctrine are considered and its decline in popularity on both sides of the Atlantic noted.

Fourthly the lex loci contractus theory is illustrated by reference to E. Gerli v. Cunard S.S. Co.¹ a New York decision chosen for its clear and oft quoted pronouncement of the lex loci contractus theory.

¹48 F. 2d. 115 (1931).

Lex Loci Contractus Theory Defined

The lex loci contractus theory emphasises the place where the contract is made; it is the law of this jurisdiction which is applied to determine any matter which might arise in an international or interstate contract.

Beale, probably the strongest and most influential advocate of this theory, suggested in his famous article² that the place of contracting may mean either the place of making the contract or alternatively the place of performance of the contract, thus bringing the rule which applies to the law of performance within the general principles that the lex loci contractus governs.

However it would seem that the more usual interpretation is that given by such writers as Weintraub³ who has stated that the lex loci contractus is the "geographical location where, according to the law of contracts, the acceptance of the offer to contract becomes effective, or more accurately would be effective if the choice of law problem were resolved in favour of the validity of the contract."

Historical Note

This theory was very popular in both the United States and England. Until 1865 the law of the place

²J.H. Beale. What Law Governs the Validity of a Contract? 23 Harv. L.R. 1 (1909-1910).

³R.J. Weintraub. Choice of Law in Contracts, 54 Iowa L.R. 399 at p.401 (1968).

of contracting appears to have been used more frequently than any other law to apply to international contracts in England.⁴ It survived as the dominant theory for a longer period in the United States due probably to the influence of Beale,⁵ however the law of the place of contracting was finally abandoned by the New York Court of Appeals in the 1950's.⁶

Advantages of the Theory

Like any mechanical rule the *lex loci contractus* theory may be said to promote certainty and predictability both of which are obviously of great importance in the commercial world. Another practical advantage given for this theory is that the country in which a contract is formed is that in which the parties can most easily obtain legal advice.⁷

At the root of this theory is the concept of territoriality. According to its proponents only the country in which acts occur can attach legal consequences to them.⁸ Beale and other advocates of this theory considered that the *lex loci contractus* theory was sound in terms of the

⁴The law of the place of contracting was abandoned by the Privy Council in P. & O. Steam Navigation Co. v. Shand (1865) 300 Moo P.C. (N.S.) 272 and by the Exchequer Chamber in Lloyd v. Guilbert (1865) L.R. 1 Q.B. 115. See Morris at p.266 et seq.

⁵The *lex loci contractus* had been adopted in the Restatement, Conflict of Laws S.332 (1934) due to Beale's influence. Discussed supra at p.22 et seq.

⁶See Auten v. Auten 124 N.E. 2d. 99 (1954).

⁷2 Beale, Conflict of Laws (1935) at pp.1091-2.

⁸Ibid and see H. Goodrich. Conflict of Laws (1949) (3rd edit.) at p.54.

territorial concept of conflict of laws.⁹ Critics question this theoretical premise¹⁰ and Beale's emphasis on the ease of application of the theory has been queried.

Beale had taken the view that "there can only be one place in which a contract is made and what that place is can never be subject to serious doubt" as "the act of contracting is a momentary act, and the contract must arise at some particular moment as the result of an act done in some one State."¹¹ This is now "demonstrably untrue."¹² This may be illustrated by Madame Pallavicini¹³ on her flight between California and New York. Neither Madame Pallavicini nor the Chairman of the hotel syndicate which hoped to buy the hotel in Mexico City would have had any idea over which state they were flying when the alleged contract was made.

Disadvantages of the lex loci contractus theory

Beale did himself admit that the place of contracting could be fortuitous but he argued that if the parties did in fact contract in a state that was completely fortuitous they would most likely be physically present in that state and would seek legal advice in that same state. The

⁹Ibid.

¹⁰E.g. E. Rabel. See 2 Rabel, *The Conflict of Laws. A Comparative Study.* (1958-1964) (2nd edit.) at p.360.

¹¹Beale op. cit. supra n.7 at p.271.

¹²Morris at p.266 note 6.

¹³Pallavicini v. International Tel. & Telegraph Corp
341 N.Y.S. 2d. 281 (1973).

Pallavicini case would suggest otherwise. Critics¹⁴ have made similar observations about the difficulty of establishing the actual place of contracting. It has also been suggested that the place of contracting may be fraudulantly selected in order to give validity to an otherwise invalid contract.¹⁵ Furthermore it may be impossible to determine the place of contracting until the contract is concluded, and finally it may be impossible to determine the place of contracting without arguing in a circle, as when an offer is posted from London and an acceptance from Hamburg and a telegraphic revocation of the offer reaches the offeree before the letter of acceptance reaches the offeror.¹⁶

These considerations reduce the force of the predictability argument almost to vanishing point. However, the law of the place of contracting was, as noted above, the law that was most usually relied upon by English courts until 1865, and whilst it may still have been a realistic choice when Beale wrote in the early part of this century it would seem to be a rigid test "more congenial to primitive days than to the far flung activities of modern commerce."¹⁷

¹⁴E.g. see E.G. Lorenzen. *Validity and Effects of Contracts in the Conflict of Laws*. 30 Yale L.J. 655 at p.673 (1921); Morris at p.266 et seq.; Cheshire at p.10.

¹⁵Morris at p.266.

¹⁶See supra at p.73 et seq.

¹⁷Cheshire at p.11.

The Decline in Popularity of the Lex Loci Contractus Theory ¹⁸

From about 1840 international trade flourished rapidly and the next decade saw the development of postal and telegraph services. The activities of banks also increased through the use of new forms of credit. "All this broke up the unity of the place and time in the making and the performance of the contract. Now both these acts were done by each party at different places and at different times."¹⁹

Thus as a rule of automatic application the lex loci contractus declined in popularity on both sides of the Atlantic.

Illustration of the Theory: E. Gerli v. Cunard S.S. Co. ²⁰

The 1931 New York Court of Appeals decision illustrates the application of this theory. The contract involved the shipment of bales of silk from Italy to New York. The bill of lading contained a limitation of liability clause and also specified that the contract should be "governed by English law."²¹ Learned Hand the Circuit Judge, in considering the validity of the limitation clause, said:

¹⁸Dicey & Morris at pp.750-1.

¹⁹O. Lando. The Proper Law of Contract. (1964) 8 Scand. Studies in Law 107 at pp.117-8.

²⁰48 F. 2d. 115 (2nd Cir. 1931).

²¹Ibid at p.117.

"Had the bill been drawn in England ... the validity of the clause would depend upon British law. In fact, it was drawn and delivered in Italy, and it is the law of that kingdom by which alone the question is to be decided People cannot by agreement substitute the law of another place."²²

²²Ibid.

2. THE LEX LOCI SOLUTIONIS THEORY

Introduction

As with the lex loci contractus theory the lex loci solutionis is first defined and the advantages and disadvantages of the theory are then considered. The early English decision of Chatenay v. Brazilian Submarine Telegraph Co. Ltd²³ is given to illustrate the operation of the lex loci solutionis; it being a clear text book example of the theory working in practice.

²³[1891] 1. Q.B. 79.

Lex Loci Solutionis Defined

Pursuant to this doctrine, the law of the place where the contract is to be performed is the law which is to be applied. Mr. Justice Story phrased the rule as follows:

"[W]here the contract is, either expressly or tacitly, to be performed in another place, then the general rule is in conformity to the presumed intention of the parties that the contract, as to its validity, nature, obligations and interpretation, is to be governed by the law of the place of performance."²⁴

Advantages of the Lex Loci Solutionis

Lord Esher, M.R. in a nineteenth century decision²⁵ considered that this was the conclusion that businessmen would come to using their "business sense."²⁶ Any other result could produce the "strange conclusion"²⁷ that one could enter a contract to be carried out in a country contrary to the laws of that country; such an intention he considered to be "hardly conceivable"²⁸ therefore the parties must have intended that the lex loci solutionis prevail.

The great advantage of this approach, says Morris,²⁹

²⁴J. Story. Conflict of Laws. S.280 (1883) (8th edit.)

²⁵Chatenay v. Brazilian Submarine Telegraph Co. Ltd.
[1891] 1 Q.B. 79.

²⁶Ibid at pp.82-3.

²⁷Ibid.

²⁸Ibid.

²⁹Morris at p.266.

is that it is based on an internal or substantial connection between the contract and its governing law instead of on an external and fortuitous one. Whatever else the place of performance may be, it is not fortuitous.³⁰ The theory also has the advantage of being certain in so far as it is a mechanical rule.

Disadvantages of the Doctrine

Whilst the arguments in its favour are, according to the adherents of the rule, "undoubtedly very weighty"³¹ there are obvious disadvantages in the doctrine. Firstly the law of the place of performance provides no solution if the contract is bilateral, as indeed most commercial contracts are, and each party has to perform in a different country which is a typical conflict of laws situation. Secondly the law of the place of performance furnishes no solution if the place of performance is optional as when an international loan secured by debentures is repayable at the debenture holder's option either in New York or London.³²

Another disadvantage which has been cited³³ is that any attempt to make the law of the place of performance govern the act of contracting is an attempt to give to

³⁰Ibid at p.267.

³¹E.G. Lorenzen. Selected Articles on the Conflict of Laws. (1970) at p.289 and see Lorenzen op. cit. supra note 14 at p.644-6.

³²Beale op. cit. supra n.7 at p.1086 et seq.

³³Ibid.

that law extraterritorial effect. Beale gave the example of an agreement being valid where made but the performance is forbidden where it is to be performed. Here, if the performance was forbidden from the word go, then the contract would be found to be invalid even by the law of the place of making. This illustrates how the rule can have extraterritorial effect. In other words it enables one state to extend its laws over the territories of another.

A further objection, according to Beale, is that difficulty might arise in obtaining expert legal advice at the time when the formation of agreement is under consideration. A legal expert can, Beale points out, really only give advice on the law of his own state and is liable to make mistakes when advising on another law. To study this other law is of course time consuming for the legal adviser concerned.³⁴

Other schools object to this theory or rule because of the rigidity which it shares with the *lex loci contractus* view.

Illustration of the *lex loci solutionis*:
Chatenay v. Brazilian Submarine Telegraph Co. Ltd.³⁵

A decision of the English Court of Appeal illustrates the application of this rule. The plaintiff, a Brazilian

³⁴Against Beale it is equally arguable that lawyers specialising in Conflict of Laws do gain expertise in the subject and can always call on foreign expert witnesses. Still admittedly time consuming and expensive, but an inevitable consequence of the subject itself.

³⁵[1891] 1. Q.B. 79.

subject, executed in Brazil, in the Portuguese language a power of attorney in favour of a broker resident in London empowering him to buy and sell shares on the plaintiff's behalf. The broker accordingly sold certain shares and the plaintiff subsequently alleged that the sale was not authorised by the power of attorney. On the trial of a preliminary issue to determine whether the construction of the power of attorney was to be governed by Brazilian or English law, Lord Esher, M.R. held that the *lex loci solutionis* governed "...[T]he law has said that if the contract is to be carried out in whole in another country, it is to be carried out wholly according to the law of that country."³⁶ Applying the *lex loci solutionis* to the facts Lord Esher M.R. concluded that if it appeared from the power of attorney that the contract was to be performed in Brazil then Brazilian law would apply; alternatively if it was to be performed in England English law would apply. Thus the construction to be put on the document would be the same whatever countries were involved, the one meaning being "I give an authority which if carried out in England is to be carried out according to the law of England, if in France according to the law of France."³⁷

³⁶Ibid at p.83.

³⁷Ibid.

Lord Esher M.R. considered that this must have been what the parties had meant and whilst the effect would be to apply the authority in different ways in different countries it effected the parties' intentions.

Lex Loci Contractus and Lex loci Solutionis

Conclusion

Whilst these two rules may have worked in former times neither are satisfactory in a world of instant communication where many contracts can be said to be truly international. Even if they only applied absent party choice both are still unsuited to the twentieth century as the cases illustrate. Persons negotiate on board aircraft which make it difficult to state where the contract is made, telex is widely used, and many contracts leave the place of performance open. Thus the two rules are inappropriate in the commercial world today.

3. A RULE OF VALIDATION: THE LEX VALIDATIS

"The object of a governing law clause is to facilitate the consummation of the intent of the contractual parties. In a sense it is an incorporation by reference into contracts of the innumerable eventualities that could be spelled out ad nauseam. Such incorporation and simplification most certainly should be encouraged. Consequently any stipulation of otherwise applicable law that clearly frustrates the intent of the parties should be disregarded."³⁸

It has been suggested³⁹ that it should be a basic choice of law principle that contracts are prima facie valid. This is what the parties intend and the law of contract should give effect to party intention. The exponents of this view argue that with an international contract one should take the contract as valid and enquire whether any grounds exist for applying an invalidating rule.⁴⁰ This idea has been expounded by various writers

³⁸C.E. Maw. Applicable Law and Conflict Avoidance in International Contracts. 25 The Record of the Association of the Bar of the City of New York. 365 at pp.374-5 (June 1970).

³⁹A.J.E. Jaffey. Essential Validity of Contracts in the English Conflicts of Laws. (1974) 23 I.C.L.Q. 1.
A.J.E. Jaffey. The Foundation of Rules for the Choice of Law. 2 Oxford J. of Legal Studs. 368 (1982).
D. Trautman. The Relation between American Choice of Law & Federal Common Law. 41 No. 2 Law & Contemp. Probs. 105 (Spring 1977).
R.J. Weintraub. Choice of Law in Contracts. 54 Iowa L. Rev. 399 at p.430 (1968).
R.J. Weintraub. How to Choose Law for Contracts and How Not to: the E.E.C. Convention. Texas Internat. L.J. 17 at pp.155-6 (Spring 1982).

⁴⁰Jaffey defines an invalidating rule as "any rule which, if applicable to the international contract in question will preclude a party seeking to enforce it or allowing it doing so, in whole or in part." Ibid at p.378.

since the 1930's.⁴¹

One English writer⁴² considers that a choice of law clause which has the effect of invalidating the contract should be disregarded as parties do not intend to invalidate their contracts when making a choice of law decision.⁴³

Jaffey, one of the leading English exponents of this rule, suggests that the purpose of contract law is to achieve justice between the parties. He sees justice at the domestic level and justice at the choice of law level. Domestic rules, the function of which is to do justice between the parties, have as their object the provision of a fair solution to the dispute. The difficulty, Jaffey says, is that different countries allow different views of what is fair and the function of the

⁴¹Heilman writing in the 1930's considered the "vital matter" of what he termed "the maximum enforceability of contracts." If a choice of law existed one should choose the law which "would attach 'validity' or the maximum enforcement or effect to the promise." See R.J. Heilman. *Judicial Method & Economic Objectives in Conflict of Laws*. 43 Yale L.J. 1082 at p.1100 (1933-34.)

⁴²Jaffey op. cit. supra n.39 at p.3.

⁴³This is not however the English position. See Ocean S.S. Co. v. Queensland State Wheat Board [1941] 1 K.B. 402.

choice of law rules is to decide which country's standards are to be applied.

Jaffey states that the English position is not helpful. Instead of holding that an international contract is governed by its proper law, (subject of course to important exceptions) the rule should be one that tells us where an invalidating rule of a domestic legal problem will apply. He suggests that an invalidating rule of a domestic system will be applicable if that domestic system is the proper law of the contract.⁴⁴

If the normal approach to international contracts was to view such transactions as valid then it has been suggested⁴⁵ that it is a manageable and understandable task to see if any invalidating rules exist.

Weintraub, an American adherent to the rule of validation considers that the rule can be stated "very simply."⁴⁶

"A contract is valid if valid under the law of the settled place of business or residence of the party wishing to enforce the contract unless the settled place of business or residence of the other party has an invalidating rule designed to protect against contracts of adhesion."⁴⁷

He agrees with Jaffey that governing law clauses which invalidate the contract should be ignored.⁴⁸ However he

⁴⁴See generally Jaffey op. cit. supra n.39.

⁴⁵Trautman op. cit. supra n.39.

⁴⁶Weintraub op. cit. supra n.39.

⁴⁷Ibid.

⁴⁸Ibid at p.156.

maintains that one should approach each contract with a presumption of validity.⁴⁹

Weintraub considers that five situations exist where the invalidating law should be viewed favourably.⁵⁰ These are as follows:

1. The invalidating rule reflects the growing concern for protection of the party in the inferior bargaining position.
2. The invalidating rule differs in basic policy, rather than minor detail from the validating rule;
3. The parties should have foreseen the substantial interest that the state with the invalidating rule would have in controlling the outcome.
4. The context of the contract is non commercial.
5. The courts of the state with the validating rule have, in similar interstate cases, deferred to the policies underlying the foreign invalidating rule.

The presence of any one or more of these five factors would result in application of the invalidating rule.⁵¹

The idea of a *lex validatis* has proved popular with other American writers; Ehrenzweig in particular favours such an approach. "The rule of validation (*lex validatis*) is in accord with the general principle, prevailing in many other areas including the conflicts of law of wills and trusts that 'if the court has a reasonable choice ... between applicable systems of law, it should choose the one that results in legal validation.'"⁵²

⁴⁹Weintraub op. cit. supra n.39 at p.410.

⁵⁰Weintraub is only concerned with questions of validity.

⁵¹Ibid at p.430.

⁵²A.A. Ehrenzweig. *Conflicts in a Nutshell*. (1970) (2d. edit.) 165 quoting A. Corbin. *Contracts* S.548 n.9 (Supp. 1964).

Ehrenzweig whilst favouring a general rule of validation does however argue that the law chosen by the parties should be applied even if it invalidates their contract. He thus limits his approval of the rule to contracts which contain no express choice of law clause.⁵³

Justification of the Lex Validatis Rule

One writer⁵⁴ has argued that absent a choice of law clause the lex validatis should apply because it is justified if not mandated by the commerce clause of the United States Constitution, a fundamental goal of which would seem to be the promotion of business convenience.

There are three general grounds for justifying the lex validatis. First and most obvious is the argument that parties intend that their contract be governed by a valid law. However the parties may not have considered the choice of law issue at all (hence the existence of the third rule of the proper law in England and a similar test in the United States).

The second argument suggests that a presumption in favour of validity is so obvious, that it differs in kind

⁵³A.A. Ehrenzweig. *Contracts in the Conflict of Laws*. (Pt. 1). 59 Colum. L. Rev. 937 at pp.991-2 (1959). It will be recalled that the Restatement (Second) Conflict of Laws S.187 Comment e at p.190 considered that in such a situation the chosen law would not be applied as to do so would defeat the parties' expectations. It must be assumed that the parties made a mistake.

⁵⁴H.H. Horowitz. *The Commerce Clause as a Limitation on State Choice of Law Doctrine*. 86 Harv. L.R. 806 at p.822 (1971).

from other types of presumptions. Weintraub⁵⁵ for example said "Unless [the parties] are engaged in some ridiculous charade, their intention is that every promise they have made in a contract be enforceable."

Another rationale for a presumption in favour of the *lex validatis* may be that application of the validating law "better serves[s] business convenience."⁵⁶

However in reply to these arguments it may be suggested that once litigation is pending one party no longer wants or expects the contract to be validated.

Criticism of the Lex Validatis

The rule of validation has its critics. Cheshire⁵⁷ considers that Heilman's theory is unacceptable. "It would be difficult to devise a method more calculated than this to import doubt and confusion into mercantile dealings."⁵⁸

It is difficult to see exactly when the presumption of validity will be displaced despite guides such as Weintraub gives.⁵⁹

⁵⁵Weintraub op. cit. supra n.39 at p.406.

⁵⁶Prebble at p.659 quoting G. Stumberg. *Principles of Conflict of Laws*. (1963) (3rd edit.) at p.239.

⁵⁷Cheshire at p.12.

⁵⁸Ibid.

⁵⁹Supra at p.402.

Prebble⁶⁰ notes that English courts cannot rationally consider a presumption of validity for cases being determined pursuant to the closest connection theory. This is because the court is theoretically not concerned with the content of competing rules. He goes on to say that American courts do not face the same difficulty quite so acutely under their rule-selection approach. Nevertheless, the validation theory poses problems. "When a court is employing the significant contacts test, it has ex hypothesi, determined that the parties had no expressed or inferable intent as to the choice of law issue.

Gruson⁶¹ has pointed out that as a general matter it is not correct to say that validation always saves the interests of the parties. Wherever the validity of a contract is at issue in litigation, one party must have concluded that its interests were not served by the validity of the contract.

Possibly the strongest argument against adopting a rule of validation in the absence of party choice is that such a rule conflicts with the trend of modern legislation. Modern socially protective legislation often invalidates contracts in order to protect the weaker party and this state of affairs seems incompatible with a general rule of validation.⁶² However it has been used in limited

⁶⁰Prebble at p.662 et seq.

⁶¹Gruson New York Approach at p.220.

⁶²Prebble at p.663 makes this point.

situations. This may be illustrated by reference to the New York Law of Usury.

New York Usury Law:

In determining the applicability of a particular state's usury law to a transaction New York applies the rule of validation. The Restatement (Second) of Conflict of laws states the rule as follows;

Section 203. "The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship"

The rule has been followed in both New York State courts and federal courts.⁶³ There are two requirements that must be satisfied for the rule to operate. The first is that a link must be established between the validating state and the transactions and the second requirement concerns the need for good faith.⁶⁴

The law becomes less clear when the question is whether the validation rule would prevail if a governing law clause in an agreement stipulated the applicability of a law under which the agreement would be invalid as being usurious.⁶⁵

⁶³E.g. Crisafulli v. Childs 307 N.Y.S. 2d. 701 (1970).

⁶⁴See Seeman v. Philadelphia Warehouse Co. 274 U.S. 403 (1927).

⁶⁵Compare the views of Ehrenzweig supra at p.403 who would have the choice of law clause prevail with Maw who would not. See Maw op. cit. supra n.38 at pp.374-5. See also R.A. Sedlar. The Contracts Provisions of the Restatement (Second). An Analysis and a Critique. 72 Colum. L. Rev. 279 at p.292 (1972).

Regrettably there appear to be no decisions directly on this point. However Gruson is probably correct in suggesting that under New York law a governing law clause would be upheld even if the contract was invalid under the chosen law.⁶⁶

A Note on the English Position

In England choice of law clauses that have the effect of invalidating a contract are upheld. The English rule of validation is only, at most, a presumption to take into account. The authority for this is Ocean S.S. Co. v. Queensland State Wheat Board.⁶⁷

This rule considered "fairly draconian" by some is accepted by others.⁶⁸ The Wheat Board decision is however the logical result of the general English approach which is jurisdictional rather than result orientated. Similarly with contracts involving no choice of law clause it is not the practice of English courts to apply a general rule of validation despite some dicta to the contrary.⁶⁹

⁶⁶Gruson Governing Law Clauses at p.361.

⁶⁷[1941] 1 K.B. 402.

⁶⁸See Prebble at p.530. In favour see R.H. Graveson. The Proper Law of Commercial Contracts as Developed in the English Legal System in Lectures on the Conflict of Laws in International Contracts 1 at p.28 (U. Mich. Law School Summer Inst. on Int'l & Comp. Law ed. 1949).

⁶⁹In Coast Ltd. v. Hudig & Veder Chartering N.V. [1972] 3 W.L.R. 286. Lord Denning suggested that it was an accepted principle that a contract is, if possible, to be construed so as to make it valid rather than invalid. This may be seen as a tendency towards favouring a lex validatis approach.

Conclusion

As choice of law clauses are becoming increasingly used the likelihood of parties choosing an invalidating law are increased.⁷⁰ In a survey carried out in New York⁷¹ 130 out of 161 law firms usually or always employed a stipulation of governing law. The findings revealed that most New York lawyers were members of the "rubber stamp" or "what-have-we-got-to-lose" school of thought. They have a standard choice of law clause stipulating that the law of their jurisdiction is to govern and they include this clause in every contract which they draft unless the other party objects.⁷²

If choice of law clauses are often boilerplate then there is a real risk that the parties could find that inadvertently their choice of law clause would result in part or all of the contract being invalid.

⁷⁰In 1968 Weintraub considered choice of law clauses were becoming "ubiquitous boilerplate" in commercial contracts. See Weintraub op. cit. supra n.39 at p.410.

⁷¹J.R. Lowe. Choice of Law Clauses in International Contracts: A Practical Approach. 12 Harv. Int. L.J. 1 (1971).
Lowe does not actually say that his sample was limited to New York, however he is a member of the New York bar and his discussion is limited to New York; it would thus seem reasonable to conclude his survey was of New York firms only.

⁷²Lowe makes the point that this is only a general observation; his survey was limited to lawyers representing powerful and wealthy clients dealing constantly with international contracts. This finding might not apply to small firms who might regard international contracts as unusual. Lowe ibid at p.2 et seq.

To employ a rule of validation in these circumstances (and thus not enforce the choice of law clause) only encourages parties and lawyers to continue this lackadaisical trend (if in fact it exists). If party autonomy was upheld then parties and their advisers might give more serious thought to the content of their agreements. Thus a rule of validation is not considered to be an acceptable exception to party autonomy. Nor is such a rule suitable as a general rule to apply to all contracts that do not contain a choice of law issue. However as a general presumption it could be a useful tool in a system that employed interest analysis. As interest analysis is not deemed an appropriate choice of law theory to use in New Zealand the rule of validation must likewise be discarded in favour of application of the *lex fori* when no governing law clause exists.

4. A LEGISLATIVE EXAMPLE

The European Convention on the Law Applicable to Contractual Obligations 1980

Introduction

The Convention on the Law Applicable to Contractual Obligations⁷³ was signed in Rome on June 19, 1980 by seven of the then nine member states of the European Economic Community.⁷⁴ The Convention developed in two stages. First a preliminary draft Convention on the law applicable to both contractual and non-contractual obligations was completed in 1972.⁷⁵ This draft was the starting point for the Convention's second stage. Negotiations took place between 1975 and 1980 the culmination of which was the present Convention. At the request of the British delegation, the provisions on non-contractual obligations were deleted to be dealt with by a subsequent Convention.

It was felt that the E.E.C. was in need of such a Convention.⁷⁶ Although all of the member states of the

⁷³In this Part hereinafter called the Convention.

⁷⁴In this Part hereinafter abbreviated to E.E.C.

⁷⁵For a survey of the Preliminary Draft of the Convention see L. Collins. Contractual Obligations - the E.E.C. Preliminary Draft Convention on Private International Law. (1976) 25 I.C.L.Q. 35, and see Harmonisation of Private International Law by the E.E.C. (ed. K.Lipstein) (1978).

⁷⁶P. Lagarde. The European Convention on the Law Applicable to Contractual Obligations. An Apologia. 22 No.1 Virginia J. of Internat. Law 91 at p.92 (1981).

E.E.C. today allow parties to a contract to choose the law that will govern their contract, different methods of determining the applicable law are used in the absence of such a determination by the parties themselves.⁷⁷ Harmonising the conflict of law rules within the E.E.C. would it was said also prevent 'forum shopping', and increase legal certainty.⁷⁸

The Convention will not come into effect until seven states of the E.E.C. have ratified it.

⁷⁷Ibid. Lagarde notes for example that in Italy the contract is governed by the national law of the parties if it is common to both. Otherwise it is governed by the law of the state where the contract was concluded. In Germany the court looks for an implicit or a hypothetical intention. If this search is fruitless, the contract is severed and each obligation arising from it is governed by the law of the country in which it is performed. In France the courts try to ascertain the "localisation" of the contract relying in particular on the place of performance and in the domicile of the party who is to carry out the characteristic performance of the contract. Ibid footnote 9.

⁷⁸See The Introduction to the Explanatory Report which accompanies the Convention by Guiliano and Lagarde O.J. 1980 C. 282/4 (hereinafter referred to as the Report).

Main Features of the Convention ⁷⁹

The Convention is world wide in effect. In other words it does not just provide choice of law rules for contracts with an E.E.C. connection. It provides rules for any international contract where an E.E.C. state is the forum.

The basic rules of the Convention follow the pattern of English law. Normally party autonomy is allowed and in the absence of choice the proper law will be the law of the country with which the contract is most closely connected. There is a presumption however that the closest connection is to be found where the party who is to effect the performance which is "characteristic of the contract" has his habitual residence, or in the case of a company, its central administration. There are other presumptions and there are also detailed rules applying to certain consumer and employment contracts. These rules tend to be of a protective character. Finally the concept of mandatory rules are employed in the Convention which can override the otherwise applicable law.

Obviously an enormous amount has been written on the Convention and its history both in English and other European languages. What follows is a discussion on the main provisions of the Convention from an English point of view with emphasis being placed on the differences

⁷⁹The Convention is summarised by Lagarde op. cit. supra n.76 and also by Morris at p.298 et seq.

the Convention will make on English Conflict of Laws. The Convention is considered from a New Zealand standpoint in so far as its provisions could affect New Zealanders or could be advantageously adopted in this country.

The Scope of the Convention⁸⁰

The Convention is divided into three parts; the first title concerns the scope of the Convention.⁸¹

The scope of the Convention is wide.⁸² It covers all contractual obligations except those mentioned in Article 1.⁸³ The most notable exceptions relate to family law,⁸⁴ arbitration agreements and agreements on the choice of the court.⁸⁵ Certain insurance contracts

⁸⁰For the full text of the Convention see Appendix A p. et seq. The text is published in the Official Journal of the European Communities for 9 October 1980. O.J. 1980 L. 266/1.

⁸¹The second title relates to the Uniform Rules and the third part entitled Final Provisions is a somewhat miscellaneous collection of Articles.

⁸²See generally Contract Conflicts: The E.E.C. Convention on the law Applicable to Contractual Obligations. A Comparative Study (ed. P.M. North) (1980) Ch. 1 (hereinafter cited as North.)
Lagarde op. cit. supra n.76 at p.94 et seq. and P. Lagarde. The Scope of the Applicable Law in the E.E.C. Convention in North Ch 3 at p.49 (hereinafter cited as Lagarde.)

⁸³See Appendix A p.548.

⁸⁴Article (1) (2) (b). Appendix A p.548.

⁸⁵Ibid.

are likewise excluded.⁸⁶

Article 1⁸⁷ states that "The rules of the Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries." Thus once a contract contains a choice of law clause even in what is otherwise a purely domestic case that choice of a foreign law brings the Convention into operation because the issue has arisen as to whether the *lex fori* or the chosen law applies.⁸⁸

Secondly it may be noted that the Convention is world wide in effect as it applies to all contracts having a foreign element whether or not they have any connection with the E.E.C. Thus new Zealanders choosing an E.E.C. state as their forum would have the Convention law applied to them (once of course the Convention is in operation.)⁸⁹

The fact that the Convention shall apply "in any situation involving a choice between the laws of different countries" has been criticised on the ground that it makes the application of the Convention depend on the forum chosen.⁹⁰ Lagarde⁹¹ gives, for example, a purely French contract which would be excluded from the scope of the

⁸⁶Article (1)(3) and Article (1)(4). Appendix A pp. 548-9.

⁸⁷Appendix A pp.548-9.

⁸⁸North op. cit. supra note 82 at p.9.

⁸⁹Article (2) Appendix A p.548.

⁹⁰Lagarde op. cit. supra n.76 at p.94.

⁹¹Ibid.

Convention if the forum were a French court. However if the forum chosen were an English court the agreement would be decided by the rule of the Convention.

Party Autonomy

The main rule of the Convention is embodied in Article 3⁹² which provides that "[a] contract shall be governed by the law chosen by the parties."

The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.⁹³ In the Report⁹⁴ it is noted that whilst the choice will often be express the court could find that the parties had made a "real choice"⁹⁵ although they have not expressly stated so in the contract.⁹⁶ However the Report⁹⁷ states quite categorically that this article does not permit a court to infer a choice of law that the parties might have made where they had no clear intention of making a choice.

⁹²See Appendix A pp.549-50 and The Report.

⁹³Article (3)(1).

⁹⁴The Report.

⁹⁵Ibid.

⁹⁶The Report. Article 3 gives the example of a standard form contract known to be governed by a particular system of law even though there is no express statement to this effect, such as a Lloyds policy of marine insurance.

⁹⁷Ibid.

This situation is governed by another article.⁹⁸

The extent of the freedom allowed to the parties is wide. No link is required by the Convention between the contract and the law selected. Nor is there any formal requirement that the choice be bona fide or legal.⁹⁹

Dépécage is allowed as the parties "select the law applicable to the whole or a part only of the contract."¹⁰⁰ Thus Article 3(1) implicitly recognises that the parties may choose one law for one part of the contract and a different law for another part.

The Convention gives the parties considerable freedom with respect to when their choice of law can be made. The choice of law may be made at any time, even after the time that legal proceedings have begun.¹ Furthermore the parties may at any time agree to subject the contract to a law other than that which previously governed it.² A change in the law at a later date must not prejudice

⁹⁸Article 4.

⁹⁹Other provisions of the Convention prevent fraudulent choices from being made. See Article 5(2) and 6(1) and other provisions concerning mandatory rules in Article 3(3) and Article 7.

¹⁰⁰Article 3(1).

¹Lagarde op. cit. supra n.76 at p.96.

²Article 3(2).

formal validity³ or adversely affect the rights of third parties.⁴

As the Report⁵ points out, this freedom to change the governing law and the liberal approach to when a choice may be made is quite logical given the initial premise that freedom of contract has been accepted.⁶ As to the way in which the choice of law can be changed "it is quite natural that this change should be subject to the same rules as the initial choice."⁷

This ability to change the proper law has been the subject of criticism; one writer considers that Article 3(2) is an "infelicitous aberration."⁸

These commentators argue that contracts cannot be born in a vacuum. A contract exists by virtue of some legal system and its effectiveness depends upon that legal system. Thus any attempt to alter the identity of the Proper law must be referred in the first instance to the law which, for the time being, constitutes the very fons et origo of the contract as a legally operative agreement.

³Pursuant to Article 9.

⁴Article 3(2).

⁵The Report Article 3.

⁶As indeed it has in all E.E.C. states. See Report. Article 3.

⁷Ibid.

⁸I.F. Fletcher. Conflict of Laws and European Community Law: With Special Reference to the Community Conventions on Private International Law (1982) at page 159 (hereinafter cited as Fletcher).

Thus Fletcher would argue that if the original proper law of the contract would refuse to recognise the effectiveness of the parties' attempt to modify their contract it cannot be but an "act of aggression"⁹ by the *lex fori* to interpose the validity of what the parties have purported to accomplish.

Fletcher concludes that the validity of any change in the choice of law should be referred first to the law which constitutes the original choice of law in order to see whether it accepts the efficacy of the parties' attempt to modify their contract. Secondly the change should be referred to the substitute law in order to confirm the very same question. Only if both laws would allow the change should such a change be allowed to occur.¹⁰

As noted above¹¹ the parties may choose a law unconnected with the contract. However, if the parties do choose a foreign law when the contract is otherwise entirely connected with one country, then Article 3(3) provides that such choice shall not prejudice the application of mandatory rules of the law of that country. "Mandatory rules" are defined as rules "which cannot be derogated from by contract."

⁹See also Collins op. cit. supra n.75 at p.44 et seq. Fletcher at p.160.

¹⁰Fletcher at p.161.

¹¹Supra at p.416.

North¹² gives the following example: an action is brought in France, because of an agreement to submit to the jurisdiction of the French courts,¹³ but the contract, which relates to the consumer sale of goods, is wholly connected with England, both parties being resident there. Any exemption clause in the contract is regulated by the Unfair Contract Terms Act 1977 (U.K.) but the parties choose German law as applicable to the contract. The French court, whilst accepting the choice of German law in general, must apply the controls on exemption clauses contained in the 1977 Act because they cannot be evaded by choice of a foreign law,¹⁴ i.e. they are mandatory in that they cannot be derogated from by contract.

The only other limitation on party autonomy within Article 3 is contained in Article 3(4) which states that the existence and validity of the consent¹⁵ of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.

Conclusion

The wide freedom of choice allowed by the convention is completely consistent with party autonomy and we would do well to allow such a freedom to apply in New Zealand

¹²North Ch. 1 at p.13.

¹³Under Article 17 of the 1968 Convention on Jurisdiction and Enforcement of Judgments.

¹⁴Unfair Contract Terms Act 1977 S.27(2) (U.K.)

¹⁵See Appendix A p.550.

conflict of laws. The requirement stating that the proper law must be reasonably certain is especially useful. Acceptance of the principle of implied selection would have created a blur between the main rule of party autonomy and the subsidiary rule which provides for the applicable law in the absence of choice by the parties.¹⁶

Given that party autonomy is allowed it is quite logical that *dépécage* be permitted and a change in choice allowed. If such a change is permissible then it is completely reasonable that this change can be made at any time. Finally the fact that the choice need not be specifically stated but must nevertheless be very obvious is again illustrative of the Convention's commitment to party autonomy.

There are however further restrictions on party autonomy and these may be summarised as follows.

¹⁶Article 4(1).

Limitations on Party Autonomy

1. Freedom to select a law implies a freedom equal to both parties. The Convention considers that this freedom is illusory in respect of some contracts. There are therefore special rules relating to certain consumer and employment contracts.¹⁷
2. A forum may decide that some rules are so fundamental that they must be applied even though the contract is international. The Convention has a specific provision on forum mandatory rules.¹⁸
3. The forum may reject the parties' choice of law if it is "manifestly incompatible with the public policy ('ordre public') of the forum."¹⁹
4. Parties may not subject their contract to the whole chosen law including its conflict of laws provisions. In other words renvoi is excluded.²⁰
5. Although it may at first appear that only Article 10 deals with the scope of the applicable law many other provisions of the Convention must be considered in this context.

Article 7, the most controversial article of the Convention, empowers the forum to apply the mandatory

¹⁷Articles 5 and 6. Appendix A p.551.

¹⁸Article 7(2) Appendix A p.552.

¹⁹Article 16. Appendix A p.555.

²⁰Article 15. Appendix A p.555.

rules of a state with a close connection to the transaction if that state's law requires the application of those rules, regardless of what the applicable law may be. This provision is a substantial modification, not only on party autonomy but also of the subsidiary choice of law rules to be applied in the absence of choice by the parties.²¹

Whilst these limits are limits on party autonomy they are, where appropriate, also limits on the applicable law which is the law applied in the absence of choice because it is closely connected with the contract.²²

The scope of the applicable law²³ and the concept of mandatory rules require further discussion.

Scope of the Applicable Law:

Article 10²⁴ defines the scope of the applicable law. The first matter considered is that of interpretation.²⁵

²¹See Lagarde op. cit. supra n.76 at p.103.

²²Article 4. Discussed infra at p.450 et seq.

²³The term 'applicable law' is used in the following pages to denote both an express choice of law and the law chosen by the court in the absence of such choice. In English terminology the applicable law is the proper law.

²⁴Article 10(1)(b).

²⁵Article 10(1)(a).

Interpretation and Performance

Interpretation and performance are governed by the applicable law of the contract.²⁷ The Convention thus sanctions cases such as Jacobs v. Crédit Lyonnais²⁸ where the facts were that the seller, having agreed to deliver goods in Algiers was unable to escape liability for non performance by pleading an excuse permissible by French law but not by English law when the proper law was English law. However in the manner of performance "regard shall be had to the law of the country in which performance takes place."²⁹ The precise scope of this would seem unclear. It was apparently included because it was a restriction which was frequently imposed by national laws and by several international conventions.³⁰ The Report states that it is for the *lex fori* to determine what is meant by the "manner of performance."

Remoteness is still governed by the applicable law. On the other hand, the English rule according to which the measure of damages is a question of procedure will be slightly affected by the Convention. The Convention generally does not exclude the possibility that the calculation of damages - in other words, the quantification of the damage in terms of money - may be governed by the *lex fori*. But, if the proper law of the contract deals

²⁷Articles 10(1)(a) and 10(1)(b).

²⁸(1884) 12 Q.B.D. 589.

²⁹Article 10(2).

³⁰See The Report. Article 10.

with this issue by a rule of law, this rule is to apply, because its existence shows that the question is one of substance not of mere procedure.³¹ For example if the applicable law limited the amount of compensation, as in matters of transport, the debtor must not be charged with an amount of compensation higher than that provided by the proper law, even if the *lex fori* does not limit compensation. Any other solution would frustrate the expectations of the parties. In return, if the creditor has stipulated in the contract that the debtor ought to pay him a lump sum in case of breach of contract, the validity of this provision depends on the proper law. In the same way, if, according to the applicable law, damages should be paid in a lump sum and not by means of periodic payments, this law applies, because it lays down on this issue a "rule of law". "On this point, common law countries and civil law systems met each other half way." ³²

The applicable law also governs presumption and limitation of actions,³³ and nullity.³⁴

In English law limitation of actions (though not presumption) is characterised as a procedural issue and hence governed in England by English law as the *lex*

³¹See Lagarde at p.55 et seq.

³²Ibid at p.56.

³³See generally Dicey & Morris at p.921 et seq.

³⁴North. Ch. 1 at p.16.

fori. The rule has been criticised by the Law Commission and if not changed before the United Kingdom implements the Convention it will be as and when the Convention law comes into force.

The consequences of nullity are governed by the applicable law pursuant to Article 10(1)(e).

North³⁵ suggests that the difficulties with Article 10(1)(e) are both theoretical and practical. As the Convention is limited to contractual obligations it is arguable that such matters as the right to recover money paid under a void contract is a matter of quasi contract or relates to the law of restitution.

North gives the example of a contract that is for the sale of a car. The parties are Englishmen and they choose French law as the applicable law. The car is to be delivered in France. The buyer pays the price; the contract is for some reason void; the car is never delivered and the buyer seeks the return of his money. There has been no factual connection with France as the money was paid in England and credited to the seller's English bank account. French law is only relevant because, notwithstanding the voidness of the contract the choice of law clause is good by virtue of Article 8.³⁶ North concludes

³⁵Ibid.

³⁶Article 8 allows the validity of any term to be determined by the law which would govern it under the Convention if the contract or term were valid unless this would be unreasonable and then the concept of habitual residence becomes important. See Articles 8(1) and 8(2).

that "it seems quite inappropriate for French law now to determine the extent to which the buyer is able to recover the money that he has paid under the void contract."³⁷

One must remain unconvinced; delivery was to take place in France and there had been a definite intention that French law apply otherwise the Englishmen would not presumably have had a choice of law clause to that effect in their agreement. The Convention gives a reasonable answer. To apply the *lex fori* in this situation does not give effect to the parties' intention and merely serves to weaken the concept of party autonomy by undermining its application.

³⁷North Ch.1 at p.16.

Material Validity ³⁸

According to Article 8 the existence and validity of a contract is to be determined by the applicable law of the contract.³⁹

"The objection which has been made in the past concerning this solution that this is a vicious circle, is not conclusive. There is no contradiction in having the law chosen by the parties determine whether or not the contract that the parties are to enter into according to that law is valid."⁴⁰

This rule that the applicable law is to govern is a general rule. There are however special rules for specific topics. For example, the rule dealing with consent is found in Article 8(2). This paragraph provides that a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent, if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law of the contract.

This rule does not concern the validity of consent (mistake, misrepresentation, duress), but only the existence of consent. The problem is to determine whether the parties to an alleged contract reached an agreement. The negotiators of the Convention had particularly in

³⁸See generally K.H. Nadelmann. Impressionism and Unification of Law: The E.E.C. Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations. 24 Am. J. Comp. Law 1 at p.8 (1976) and see D. Cavers. The Common Markets Draft Conflicts Convention on Obligations: Some Preventive Law Aspects. 485. Cal. L. Rev. 603 at p.609 (1975).

³⁹See Appendix A p.552 and The Report.

⁴⁰Lagarde at p.49.

mind the question as to whether silence can be treated as a manifestation of assent. But the rule can also apply to questions related to offer and acceptance. Suppose X, in country A, sends an offer to contract to Y, in country B, and the offer contains the proposal that the contract should be governed by the law of country A. Y does not reply to this letter, or he sends a letter of acceptance which is lost in the post. It may be that, by the law of country A, Y is bound, but by the law of country B he is not. Were these issues to be governed by the applicable law of the alleged contract, the law of country A, Y would be bound despite the fact that he would not have been bound under the law of his social and legal environment. "Such a result would seem to be unjust." ⁴¹

In the event of such silence, two laws are accumulating applicable to the question of consent: the law of the contract and the law of the country where the silent party has his habitual residence.⁴²

This provision may be criticised.

In the above example it is not unjust if the letter is lost. Two possibilities exist here. If Y knows that by the law of country A acceptance is complete on posting then when he posts the letter whereby he accepts the governing law clause he knows his acceptance is complete.

⁴¹Ibid at p.50.

⁴²See also Lagarde op. cit. supra n.76 at p.101.

The fact that the letter is lost is irrelevant. He is bound by the law of country A. Nothing is unjust about this situation.

In the second situation Y does not know that by the law of country A acceptance is complete on posting. Thus when the letter is lost he thinks he is not bound. It is not unjust to hold him to the contract because he accepted the law of country A to govern. He should have familiarised himself with its rules before so doing. There is no need to have a special rule in this lost letter situation. Party autonomy should apply.

If Y does not reply then if the forum was England there would be no contract. Again it is not unfair. The *lex fori* can determine the matter.

The second point to make with respect to the scope of the applicable law is that the applicable law does not necessarily determine the formal validity of the contract.

Formal Validity

Article 9⁴³ provides that the contract is formally valid if it satisfies the formal requirements of either the applicable law or the law of the country where it was concluded. This applies if the parties are in the same country when the contract is concluded.

If parties are in different countries the contract "is formally valid if it satisfies the formal requirements of the law which governs it under the Convention or the law of one of those countries."⁴⁴

Whilst this may be seen as an "extreme limit of favor validatis"⁴⁵ the Article does provide two limitations.⁴⁶ In consumer contracts and in contracts relating to immovable property the formal validity is governed respectively by the law of the consumer's habitual residence⁴⁷ and by the law of the country where the immovable property is located.⁴⁸

Conclusion

The scope of the applicable law is wide. The basic rule is that the parties' choice of law decision governs

⁴³Article 9(1). See Appendix A p.553. The Report.

⁴⁴Article 9(2).

⁴⁵Lagarde at p.53.

⁴⁶In Articles 9(5) and 9(6).

⁴⁷Article 9(5).

⁴⁸Article 9(6).

the various contract issues that could arise. If the law is chosen by the court the same consequences flow.

If one is going to have a general rule then obviously that rule should apply as often as possible. This was a criticism of the proper law doctrine in England.⁴⁹ If the court had gone to an enormous amount of bother by establishing the proper law by say, the third rule of the proper law, it could be quite likely that the proper law then might not apply but rather some other concept be utilised to resolve the issue. The case law is so scant for specific topics that it cannot be certain that the proper law would determine the issue under consideration.

The Convention on the other hand does allow the applicable law to be omnipotent. The issue of capacity is perhaps the only important area where the Convention does not allow the applicable law to dominate. This would appear to be as good a place as any to consider this contractual issue.

⁴⁹See supra at p. 70 et seq.

Capacity

The Convention makes no provision for capacity⁵⁰ except to the limited extent of Article 11.⁵¹ This provides that if the parties are in the same country, a natural person can only invoke his capacity under some other law, for example that of his domicile or nationality if the other party was or ought to have been aware of it.

This provision does not apply to persons other than natural persons and both parties must be in the same country. A further limitation cited in the Report⁵² is that this article is only to be applied where there is a conflict of laws. The law which governs the question of capacity of the person claiming the disability must be different from the law where the contract was concluded and furthermore that person must be deemed to have full capacity by the *lex loci contractus*. Finally the burden of proof lies on the incapacitated party; it is he who must establish that the other party knew of his incapacity or should have known of it.⁵³

As the Report points out⁵⁴ the effect of Articles 1 and 11 is that each contracting state will continue to apply its own system of private international law to con-

⁵⁰See Article 1(2)(a) and 1(2)(e) Appendix A pp.548-9.

⁵¹See Appendix A p.554.

⁵²See Report. Article 11.

⁵³*Ibid.*

⁵⁴*Ibid.*

tractual capacity. Capacity can be seen as a personal issue and thus governed by the parties' national law.⁵⁵ Thus uniformity is not to be achieved by the Convention in matters concerning capacity. The exclusion of these questions appears to be bound up with a reluctance to have the Convention deal with any matters relating to corporation law, perhaps in the light of the discussions on the 1968 Convention on the Mutual Recognition of Companies and Bodies Corporate. It is not, however, by any means certain that a general rule as to capacity of corporations would have encroached upon corporation law, but the consequence is that an important part of the law relating to contractual matters in the conflict of laws will remain regulated by a combination of the 1968 Convention and non-uniform rules of private international law.⁵⁶

To Conclude

In relation to party autonomy the Convention's provisions as discussed so far allow a wide freedom of choice and this choice is then applied to resolve most issues. The plan is excellent, however the concept of mandatory rules dulls this excellence. It is these rules that must be next considered.

⁵⁵Collins at p.211.

⁵⁶Ibid.

The Concept of Mandatory Rules⁵⁷

The Convention refers in a number of places to mandatory rules⁵⁸ but they are only defined "casually"⁵⁹ in one place.

Article 3(3) defines mandatory rules as "rules of law of a country which cannot be derogated from by contract."

These rules are used in four different situation.

1. The term is used in certain consumer and employment contracts. This may be referred to as an Article 5 & 6 situation.⁶⁰
2. The term is used in Article 3(3) which states that "the fact that the parties have chosen a foreign law ... shall not, where all the other elements relevant to the situation at the time of the choice

⁵⁷ See generally D. Jackson. Mandatory Rules and Rules of Ordre Public, North Ch. 4 at p.29 et seq (hereinafter cited as Jackson).

A. Philip. Mandatory Rules, Public Law (Political Rules) and Choice of Law in the E.E.C. Convention on the Law Applicable to Contractual Obligations. North Ch. 5 at p.81 et seq. (hereinafter cited as Philip). The Report. Collins at p.205 et seq.

C.G.J. Morse. Contracts of Employment and the E.E.C. Convention on Contractual Obligations. North Ch. 7 at p.143 et seq. For Mandatory Rules and Employment Contracts.

T. Hartley. Consumer Protection Provisions in the E.E.C. Convention, North Ch. 6 at p.111 et seq. for Certain Consumer Contracts and Mandatory Rules.

⁵⁸ Articles 3(3), 6, 7 & 9(6) respectively.

⁵⁹ Jackson at p.65.

⁶⁰ See also Section 9(6).

are connected with one country only prejudice the application of mandatory rules." Thus Article 3(3) situation requires a choice of law decision by the parties and all the relevant contacts (save the actual choice itself) to point to another jurisdiction. This other jurisdiction could be the forum or a third state presumably.

3. Article 7(2)⁶¹ states that "[n]othing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract." This Article 7(2) situation permits mandatory rules to be used if they are the forum's mandatory rules whether or not a choice of law clause exists.

4. Finally mandatory rules are used in a situation where the contract has a close connection with a given country irrespective of the chosen law. Article 7(1)⁶² states "when applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country those rules must be applied whatever the law applicable to the contract..." In this situation a law may have been chosen by the parties or have been decided by the court in the absence of such choice.

⁶¹See Appendix A p.552.

⁶²Ibid

Both North⁶³ and Jackson⁶⁴ have pointed out that the meaning of the concept differs within these four situations. Jackson suggests the term 'mandatory' is used in the domestic law sense to mean that a rule cannot be derogated from by contract. This is how the term is defined in Article 3(3), and this is the meaning to be given to the concept in an Articles 3(3) or Article 5 or Article 6 situation. The objective in these Articles is clear. The parties cannot evade the application of any of the mandatory rules of their domestic law by a choice of law clause.⁶⁵

However in a situation pertaining to Article 7(1) the concept is used in a conflict of laws sense to mean that such a mandatory rule overrides the process,⁶⁶ it must be applied by the legal system of which it is part whatever the law applicable to the contract might be. In this sense the mandatory rules are applied only "if the forum is of the view that the legal system of which the rule is part regards the rule as overriding the conflicts process."⁶⁷

North's⁶⁸ conclusion is that if one reads Article

⁶³North Ch. 1 at p.19 et seq.

⁶⁴Jackson at p.65 et seq.

⁶⁵North Ch. 1 at p.19.

⁶⁶Jackson at p.65.

⁶⁷Jackson ibid at p.66.

⁶⁸North Ch. 1 at p.19.

3(3) and 7(1) together then

".... a judge in England concerned with a contract whose proper law is French, but which is closely connected with Denmark, may apply Danish mandatory rules, i.e. rules which cannot be contracted out of, provided that, under Danish law, those rules are internationally mandatory, i.e. applicable in Denmark notwithstanding a foreign (here French) applicable law."

There appears to be a choice between Article 3(3) and Article 7(1). If the court finds that all the contacts (save the choice) point to another jurisdiction the forum can decide that this other jurisdiction's mandatory rules apply without considering how this other jurisdiction would view the issue. In North's example if the judge finds all the contacts to be Danish he may then apply Danish mandatory rules to the contract even if it was a situation where Danish law would not apply such rules. This could easily arise if the states involved were not all members of the E.E.C. It is an Article 3(3) situation.

On the other hand if the judge decides that the contract has only a close connection with another jurisdiction (as opposed to a total connection) he must consider what that other jurisdiction would do and he may only apply the mandatory rules of that other jurisdiction if that other jurisdiction would do so.

This interpretation of mandatory rules is supported by viewing the objectives of such rules. These have been summarised as follows:

"The purpose of the rules which apply the term 'mandatory rules' differs. The purpose of Article 3(3) and Articles 5 and 6 is to restrict party autonomy in certain cases. The purpose of Article 9(6) is to replace the otherwise applicable law, whether chosen by the parties or the result of an objective choice of law, by the law of the situs. And the purpose of Article 7 is, in certain cases, to permit the application of a law other than the *lex causae*, be it the law of the forum or the law of a third country."⁶⁹

The Effect of Mandatory Rules

In all the situations discussed above the court is given a discretion whether to apply the mandatory rules or not. Certain conditions must be met before the court may consider their applicability. For example Article 7(1) states three conditions:

- (i) the situation must have a close connection with the laws of that other country;
- (ii) under the laws of that other country, the mandatory rules must be applied whatever the law applicable to the contract;
- (iii) regard shall be had to the nature and purpose of the mandatory rules and to the consequences of their application or non-application.

Once these conditions are fulfilled then Article 7(1) provides that effect "may" be given to the mandatory rules, and in considering whether to give effect to these mandatory rules, regard shall be had to (a) their nature, (b) their purpose, (c) the consequences of their application and (d) the consequences of their non-application. Elements (c) and (d) were added to elements (a) and (b)

⁶⁹Philip at p.81.

at a comparatively late stage. According to the Report,⁷⁰ the addition of these elements was intended to define, clarify and strengthen the rule, although it is extremely difficult to see in what way they did so.⁷¹ The authors of the Report go on to say ⁷² that the expression "effect may be given" imposes on the court the extremely delicate task of combining the mandatory provisions with the law normally applicable to the contract in the particular situation in question, and it was the novelty of this provision and the fear of the uncertainty to which it could give rise, that led delegations to ask for the power to make reservations in respect of Article 7(1).

When the United Kingdom signed the Convention the right not to apply the provisions of Article 7(1) was therefore exercised.⁷³

North⁷⁴ suggests that the United Kingdom thought Article 7(1) was a "recipe for confusion, in that a judge might feel obliged to steer his way through three possibly mutually inconsistent sets of mandatory rules; for uncertainty, an uncertainty which freedom to choose the applicable law is intended, in the business community, to avoid; for expense, in that proof of the mandatory

⁷⁰See Report Article 7.

⁷¹Collins op. cit. supra n.75 at p.213.

⁷²See Report Article 7.

⁷³By virtue of Article 22.

⁷⁴North Ch. 1 at p.19. See Jackson at p.72 et seq. for a defence of Article 7(1). See also Philip at p.100 et seq.

rules of all relevantly connected foreign laws might be called for; and for delay, in that Article 7(1) might provide the means of delaying litigation inordinately, with a fear that it might frighten potential arbitration and litigation away from the United Kingdom."⁷⁵

To return to mandatory rules in general, the view has been advanced that "it may not be too extreme to say that the idea of mandatory rules overriding the choice of law process will come as a novel experience to the English judiciary."⁷⁶

However at the end of the day the effect in England may be undramatic.⁷⁷ Articles 5 and 6 only apply to certain specific contracts and Article 3(3) can be seen as a clearer statement of Lord Wright's 'bona fide' requirement in the Vita Foods case.⁷⁸ Article 7(2) is arguable only as a reiteration of what the cases did via public policy, or characterisation etc. Finally, Article 7(1) has not been accepted by the United Kingdom. Even if it had been adopted, "it may be asked whether or not the discretion given by Article 7(1) goes far beyond current English practice and would impose upon the judge a discretionary power without giving the slightest guidance as to how it is to be exercised,"⁷⁹ as at present occurs when the judge

⁷⁵North, Ch. 1 at p.20.

⁷⁶Jackson at p.70.

⁷⁷See Jackson at p.71 for a contrary view.

⁷⁸Vita Food Products Inc. v. Unus Shipping Co. Ltd. [1939] A.C. 277.

⁷⁹Collins op. cit. supra n.75 at p.213.

is asked to apply the third rule of the proper law.

Also Article 7(1) may not be as revolutionary as some would see it. English courts have considered rules applying in jurisdictions which are neither the forum nor the proper law. For example in Ralli Brothers v. Compania Naviera Sota of Aznar⁸⁰ Spanish law was applied although it was neither the lex fori nor the proper law.

Criticisms of the concept of mandatory rules

(1) Criticism of Article 7(1)

Most criticism is centred on this Article. One objection voiced against this provision is that it gives greater effect to a law of close connection than either the governing law or the law of the forum.⁸¹

Jackson points out that this is not a proper criticism as this is the aim of the Article itself. The Article is designed to operate in a situation where the mandatory rules of another jurisdiction are so important that they must be applied despite the governing law or lex fori.

A second criticism of Article 7(1) is that it will create uncertainty.⁸² Legal advisers will not know how to advise clients and the judiciary will find it difficult to judge. Jackson⁸³ merely emphasises the view that

⁸⁰[1920] 2 K.B. 287.

⁸¹Jackson at p.73.

⁸²Ibid, and Philip at p.107.

⁸³Jackson at pp.74-5.

what is or is not a mandatory rule should not be too hard to determine. However this is not the point. It is the discretion which is conferred on the judge and the vague criteria provided by Article 7(1) that makes for the uncertainty.⁸⁴ One can also disagree with Jackson concerning the ease of establishing what is a mandatory rule in any given jurisdiction. He says that in so far as the rules are legislative, the responsibility is on the legislature to declare its view and in so far as they are judge-created rules they will be exceptional and will be clearly articulated as mandatory. This would seem an over optimistic view. Domestic statutes usually ignore the subject of conflict of laws and the common law does not have a heritage of classifying rules into mandatory and non-mandatory rules. To decide whether one's own law is or is not mandatory in any given situation is likely to be a difficult task; to decide the same of a foreign statute could be a Herculean undertaking.

A related problem concerns the difficulty of introducing the concept of mandatory rules of a state which is not the forum nor the state which has had its law chosen by the litigants. Jackson⁸⁵ points out that it is for the party who wants the mandatory rule to apply to

⁸⁴By introducing a form of interest analysis Article 7(1) may be seen as having all the disadvantages of interest analysis generally (discussed in the American context above.) See *supra* at p. 300 et seq.

⁸⁵Jackson at p. 75.

convince the court that such a rule should be given effect to. However if mandatory rules are so important that they should be allowed to override an express choice of law clause then there should be some mechanism for bringing them to the court's attention in the first place. It would seem quite unsatisfactory to leave their appearance to the whim of a litigant.

In North's illustration above⁸⁶ if one party would still like the French choice of law clause to apply and the other would like the *lex fori* to resolve the issue how is the court even going to consider Danish law? This is a likely fact situation given that one party could well have chosen the English forum because he wanted the *lex fori* to apply, seeing the advantages of having English law govern his argument and likewise it is very likely that given a choice of law clause existed initially only one party will subsequently want to escape its consequences, the other being quite content to abide by the original provisions.

This last criticism is not unique to Article 7(1). It may be equally well argued in the context of the other mandatory rules.

(2) The second major argument concerning mandatory rules relates to the question of their desirability.

Any limitation of this nature on party autonomy can be seen as highly undesirable. Mandatory rules could

⁸⁶Supra at p. 437.

undermine the whole concept of party autonomy if frequently applied and they would introduce uncertainty into what should be an area of certainty.

Parties choose a law to govern their contract for at least two reasons. First a choice of law clause makes for certainty. The parties know in advance by which law their actions will be judged in the event of a dispute. Secondly and equally importantly, the parties together choose a law that will suit their particular circumstances. They could write out verbatim all the contractual terms necessary to govern any situation that might arise; they could also incorporate some provisions of a foreign law if they wished.⁸⁷ However it is easier to state a law to govern if one can be found that suits both parties, as a choice of law clause is a shorthand way of expressing one's wishes as to what is to happen in a given event. As a general statement it is true to say that a contract is 'created' by the parties and that pursuant to general contract law principles in common law countries the parties may contract out of most legislation. The parties may do more or less what they want. So if two Danes choose French law to govern their contract and one of them subsequently chooses England as the forum to resolve a dispute, why should an English judge apply some mandatory rule of Danish law to the litigants before him?

⁸⁷For the difference between incorporation of a foreign law and choice of law clauses see Morris at p.274.

Given that the parties are of equal bargaining power they should not be haunted by some mandatory rule which they had avoided by a choice of law clause. There is nothing inherently wrong about wanting to avoid some rule of law. If the Danes are always going to be ensnared by Danish law⁸⁸ they might just as well call it a day and not make a choice of law decision at all.

The desirability of mandatory rules of the *lex fori* applying in certain situations may also be questioned. Again there is the problem of ascertaining such rules but even if this can be done one wonders if such rules should be applied. Mandatory rules of the *lex fori* are designed to apply to domestic contracts. If the only connection between the contract and the forum is that one party has chosen the forum in which to litigate it is not particularly appropriate to apply forum law when the parties have expressly chosen another law to apply to their contract. If the mandatory rule was of a protective nature then to apply it to parties in equal bargaining positions who have clearly rejected such protective rules (by choosing another law to govern) is to overmother in an inappropriate situation.

If the only contact is the choice of forum then the only ground that the forum can have in interfering in an international contract containing a choice of law clause is if it is asked to uphold some rule which is manifestly incompatible with its own public policy.

The situation becomes a little different if the parties are doing something within the forum state that

⁸⁸Supra at p.437.

natives of the forum could not do. If in Denmark one must pay the government a fee for acting as a real estate agent then it is asking too much of a Danish forum to uphold French law⁸⁹ and thus allow the Danish parties to escape payment and the same conclusion would apply if the Danes were Englishmen. So is the Danish rule to be considered mandatory?

It has become a Golden Acres⁹⁰ situation. One could argue that party autonomy applied subject to an overriding provision in the Danish/Queensland legislation. The result is the same whether one uses the terminology of mandatory rules or overriding statutes of the forum. Mann's views above⁹¹ are to be preferred in this area of law. Party autonomy should prevail.

The conclusion thus far is that mandatory rules of a state which is neither the forum nor the governing law state should not be considered. Article 7(1) is not a good provision.

Furthermore, in general Article 7(2) is not needed as a public policy exception will suffice in most situations where Article 7(2) would apply. However fact situations could occur where although not of a nature to evoke public policy the forum cannot be expected to totally uphold party autonomy. Perhaps it is simpler to state that party autonomy is limited by overriding statutes of the

⁸⁹Which let us suppose has no such requirement.

⁹⁰Golden Acres Ltd. v. Queensland Estates Ltd. [1969] St. R. Qd. 378.

⁹¹Supra at p.311 et seq.

forum rather than suggest mandatory rules of the *lex fori* dominate. The result is the same, the choice of law clause is still valid save where it conflicts with the statute or mandatory rule.

Given that it has been argued that specific contracts should not be singled out for separate treatment there can be no virtue in favouring Articles 5 & 6 and their mandatory rules.

With Article 3(3) if the country most closely connected is neither the forum nor the country of the chosen law then the conclusion drawn above in the context of Article 7(1) would still apply. If the closely connected country was the forum then the conclusion drawn for Article 7(2) would apply.

Finally it should be noted that the Convention does not state that the mandatory provisions of the governing law operate. This is obvious. If one chooses a law to apply to one's entire contract instead of applying *dépéçage* to avoid certain unwanted consequences then the mandatory rules of the chosen law should and will apply.

From a New Zealand viewpoint the concept of mandatory rules appears to have little to offer. From the English point of view so long as Article 7(1) is eliminated the rules may well have little effect. They are optional and judges may be loath to embark upon an enquiry that is time consuming and can be resolved by other means.

European litigants not wishing to have mandatory rules apply to their contracts may simply avoid the Convention's provisions by the use of arbitration and choice of forum clauses.⁹² It all seems an enormous anticlimax.

⁹²Article 1.

The Applicable Law in the Absence of Choice⁹³

The Applicable law in the absence of choice is the law of the country with which the contract is most closely connected. This rule is contained in Article 4(1). Thus far the rule is the third rule of the proper law doctrine.⁹⁴ However the Convention attempts to make this general principle more precise by use of presumptions⁹⁵ the most important of which is that of characteristic performance.⁹⁶

However the presumption of characteristic performance does not apply if it cannot be determined⁹⁷ and the other presumptions shall be disregarded "if it appears from the circumstances as a whole that the contract is more closely connected with another country."⁹⁸

⁹³See generally J.C. Schultz. The Concept of Characteristic Performance and the Effect of the E.E.C. Convention on Carriage of Goods. North Ch. 8, at p.185 et seq.
Lagarde op. cit. supra n.76 at p.97.
The Report Article 4.

⁹⁴The term 'country' rather than 'the system of law' is, however, used. See infra at p.550.

⁹⁵Article 4(2), 4(3) and 4(4). See Appendix A p.550.

⁹⁶In Article 4(3) it is presumed that the contract is most closely connected with the country where immovable property is situated if the subject matter of the contract is a right in immovable property.

⁹⁷Article 4(5).

⁹⁸Ibid.

The Concept of Characteristic Performance

Article 4(2) states that ".... it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or in the case of a body corporate or unincorporate its central administration"⁹⁹

The Convention does not define the term beyond this and the Report merely cites examples of what amounts to the presumption. For example the Report¹⁰⁰ suggests that the payment of money is not the characteristic performance of a contract for the supply of goods or services, rather it is the performance of the obligation for which payment is due, i.e. the provision of the goods or services. This means that there is a presumption in favour of the seller's law. At the end of the day, however, this is only a presumption which may be displaced¹ if the contract is more closely connected with another country. "The end result is much the same as that achieved by present English law, but by a more complex route."²

It has been suggested that "calling the supply of goods or services more 'characteristic' than the payment

⁹⁹Article 4(2) see Appendix A p.550.

¹⁰⁰See The Report Article 4.

¹By Article 4(5). See Appendix A p.551.

²Morris & North at p.466.

of money provides a verbal agreement for preferring the law of the supplier's home state or business establishment over that of the payer."³ Diamond⁴ contends that there is no empirical evidence to support such "extravagant claims" and the concept has been criticised by a number of writers⁵ as "arbitrary"⁶ and "bound to disappoint the hopes of certainty it raises."⁷

Collins considers that the Report tends to gloss over the problem of characteristic performance by emphasising that in bilateral or reciprocal contracts one of the parties usually merely has to pay money, and the characteristic performance of the contract is not the payment of money, but the performance for which payment is due (e.g. provision of

³F.K. Juenger. The E.E.C. Convention on the Law Applicable to Contractual Obligations: An American Assessment. Ch. 13 North p.295 at p.301.

⁴A.L. Diamond. Conflict of Laws in the E.E.C. (1979). 32 Current Legal Probs. 155 at p.159.

⁵E.g. Juenger op. cit. supra n.3. at p.301.
Diamond op. cit. supra n.4 at p.301.
J. d'Oliveira. "Characteristic Obligation" in the Draft E.E.C. Obligation Convention. 24 Am. J. Comp. Law 303 at pp.309-13 (1977).

⁶Ibid.

⁷Juenger op. cit. supra n.3 at p.301.

a service or delivery of goods) which usually constitutes the centre of gravity and the socio-economic function of the contractual transaction.⁸ However with certain contracts such as distribution contracts "it can hardly be said that it is necessarily the case that the obligation of the producer and not the distributor comprises the essential characteristic of the contract."⁹

Other writers make similar observations,¹⁰ and conclude that "the more complex a transaction the less helpful the criterion becomes."¹¹

"Furthermore, the concept of characteristic performance capriciously confers a choice-of-law privilege upon those who engage in a consistent course of conduct to supply goods or services. These are often the very parties best able to evaluate the risk of doing business internationally and to hedge against it by means of choice-of-law and forum-selection or arbitration clauses."¹²

⁸Collins op. cit. supra n.75 at p.209.

⁹Ibid at p.210. For example see Evans Marshall & Co. v. Bertola [1973] 1 W.L.R. 349 (concerning the distribution of sherry in England). Under Article 4(2), the contract would be governed by Spanish law (the law of both the central administration and the place of business of the Spanish company) if the production and delivery of the sherry reflected the performance which was characteristic of the contract, and by English law (the law on the distributor's central administration and relevant place of business) if the acceptance and promotion of the sherry was regarded as the performance characteristic of the contract.

¹⁰Juenger op. cit. supra n.3 p.451 at p.301.

¹¹Ibid.

¹²Ibid.

The concept also clashes with Articles 5 and 6 of the Convention which favour economically disadvantaged parties.

North¹³ points out that the main purpose of this presumption is to provide a compromise - a compromise between those who seek certainty and predictability in the determination of the applicable law under Article 4(4) and those who, like English lawyers, see merit in the flexibility of the general rule and see little virtue in presumptions and believe that, if there are to be presumptions, they must be rebuttable, (which however can defeat their very object).

Whilst some writers consider that the adoption of the concept is "a praiseworthy exercise of the draftsman to try to formulate a rule which should give more certainty than the closest connection test,"¹⁴ others¹⁵ suggest that all in all, the Convention's attempt to localize contracts by means of a "mysterious, almost a mystical, concept"¹⁶ like earlier proposals having a similar thrust, is but another "unconvincing production of divination

¹³North, Ch.1 at p.15.

¹⁴Schultsz op. cit. supra n.93 at p.186.

¹⁵E.g. Diamond.

¹⁶Referring to Diamond op. cit. supra n.4 on p.451 at p.169.

rather than inquiry."¹⁷ Since it focuses on the home state law of one of the parties, rather than on their common concerns, the test cannot easily be reconciled with the proper law approach it is meant to clarify.

It may be asked whether Article 4 does more than resurrect the presumption that the law of the place of performance is to govern although in English law, presumptions are now whether for good or for ill out of fashion and rejected.

Given that rule 3 of the proper law has been criticised in the English setting nothing further need be said here about Article 4 except that the concept of characteristic performance would probably be as unsatisfactory as rule 3 of the proper law is itself. If presumptions are to be used then they must be capable of precise application. For example the presence of an arbitration clause could be seen as a clear presumption that can easily be applied to assist in the determination of the proper or applicable law. The concept of characteristic performance is simply too inherently vague to provide the court with any clear assistance.

Finally and as a minor matter it would have been preferable if the term 'system of law' had been used instead of 'country'. Contracts with a country emphasis geographic contracts which are often fortuitous.¹⁸

¹⁷Juenger op. cit. supra n.3 on p.451 at p.302.

¹⁸See P.R. Williams. The E.E.C. Convention on the Law Applicable to Contractual Obligations. (1986) 36 I.C.L.Q. 1 at p.14 et seq.

Effects of the Convention and Some Conclusions

Finally a note on the effects of the Convention. It seems that amongst English writers "there is general agreement that adoption of the Convention will effect no fundamental changes in English law."¹⁹ and "it will be rare for a court to reach a result on the Convention rules different from that which it would reach today."²⁰ Specific articles have been criticised and on a wider scale the Convention has been condemned because it has not incorporated theories considered desirable.²¹ At an even more general level the Convention has been attacked for usurping the Hague Conference's territory:

"The common Market has apparently chosen to pre-empt for itself codification of the rules of conflict of laws, thus blocking the Hague Conference from doing the job for which it was created. This is a heavy responsibility. Having the Conference operate at the Market's pleasure, to pick up crumbs here and there is not likely to appeal to the other Member States." ²²

¹⁹Collins at p.215.

²⁰Morris & North at p.466.

²¹E.G. R.J. Weintraub. How to Choose Law for Contracts and how not to: the E.E.C. Convention. 17 Texas Int. L.J. 155 at pp.155-6 (Spr. 1982) criticised the Convention for having no general rule of validation.

²²K.H. Nadelman. Clouds over International Efforts to Unify Rules of Conflicts of Laws. (1977) 41 Law and Contemp. Probs. 54 at p.71 and see F.A. Mann. Book Review of Contract Conflicts. (1983) 32 I.C.L.Q. 265 at p.266. "Harmonisation throughout the E.E.C. leaves the rest of the world out of account."

Many American writers see similarities between the Convention and "American ideas."²³ Ehrenzweig for example was the first to differentiate between ordinary and consumer contracts.²⁴ Article 7 has been seen as introducing a form of interest analysis²⁶ and Leflar's²⁷ views may be seen as acceptable by the Convention. Cavers²⁸ has stated that the Convention pursues objectives that are contained in his 'principles of preference' and Juenger²⁹ has listed a number of matters where the Convention and Restatement are similar or identical.

It would appear correct to conclude that many scholars see the Europeans with their E.E.C. Convention as having gone a long way down the road of the American conflicts revolution. But at the same time it must be recalled that whilst similarities may be seen between the

²³E.g. Juenger op. cit. supra n.3 on p.451 at p.302. et seq.

P. Lagarde. The Convention on the Law Applicable to Contractual Obligations. 22 Va. J. Int'l L. 91 (1981).
D. Cavers. The Common Market Draft Conflicts Convention on Obligations. Some Preventative Law Aspects. 48 So. Cal. L. Rev. 603 at p.613 (1975).

²⁴Juenger op. cit. supra n.3 on p.451 at p.302. Ehrenzweig made this distinction in an article published in 1953. See A.A. Ehrenzweig. Adhesion Contracts in the Conflict of Laws. 53 Col. L. Rev. 1072 (1953).

²⁵Article 5.

²⁶Lagarde op. cit. supra n.76 at p.91.

²⁷See supra at p.438 et seq.

²⁸Cavers op. cit. supra n.38 at p.613.

²⁹Juenger op. cit. supra n.3 on p.451 at p.302 et seq.

Restatement (Second) and the Convention differences do exist.³⁰ Furthermore it may be stated that the goals and aims of interest analysis are very general and could be seen as applying in all situations where the choice of law problem exist. Finally it must be remembered that the Convention and Restatement serve very different purposes. The Convention is directed to the future whilst the Restatement (Second) purports to state the law.³¹

However to the extent that the Convention has similarities with interest analysis it may be said to share the criticisms of that approach. Lack of certainty is probably the greatest criticism that can be levelled at the Convention,³² and this lack of certainty results from the introduction of mandatory rules and the concept of characteristic performance which in no way assists an already uncertain test.

By way of conclusion one may contrast the views of North and Mann. The latter considers the convention

³⁰See Juenger op. cit. supra n.3 on p.451 at p.297. et seq.

³¹Reese, the Reporter for the Restatement (Second) does however call it a "transitional document" that was "written during a time of change and chaos where there was little indication of the direction that would be taken by future developments in choice of law..." W.L.M. Reese. American Trends in Private International Law: Academic & Judicial Manipulation of Choice of Law Rules in Tort Cases. 33 Vand. L. Rev. 717 at p.734 (1980).

³²See R.J. Weintraub. Functional Developments in Choice of Law for Contracts. (1984) (iv) Recueil des Cours 243 at p.285.

"one of the most unnecessary, useless and, indeed, unfortunate attempts at unification or harmonisation of the law that has ever been undertaken"³³ and "fervently" hopes that no British Government will ratify it and that no British Parliament will be prepared to adopt it. He alludes to the hazards of statutory interpretation and suggests that the Convention may allow certain E.E.C. countries to improve their law at the expense of Britain which "is expected to sacrifice one of the most satisfactory indigenous bodies of law."³⁴

North on the other hand suggests that "at the end of the day the result of implementation of the Rome Convention in England will be that the choice of law rules in contract are put on a clear, firm, statutory basis. There will be no great substantial change in the rules which have worked well for a long period. But there will be the benefit of substantial harmonisation throughout the E.E.C. in an area of law of real significance for the free provision of goods and services within the Community."³⁵

Both writers may be seen as partially correct. The Convention by Article 3 clearly supports party autonomy and clarifies certain related matters and by being put on a firm statutory basis the Convention should work well

³³ Mann op. cit. supra n.22 at p.266.

³⁴ Ibid at p.266.

³⁵ North. Ch. 1 at p.23.

with respect to party autonomy. However Mann may be seen as correct in considering the Convention "useless" when there has been no choice of law decision made by the parties.

"Perhaps the main advantage to the English lawyer will be that he will be able to find the relevant law in a relatively short and succinct piece of legislation rather than have to embark on a tortuous investigation into the often ambiguous, often conflicting case law."³⁶

From a New Zealand perspective the Convention has little to offer by way of new concepts. Its general characteristic of supporting party autonomy may however be seen as sound.

As Williams notes above³⁷ the Convention will make the law easy to find. Legislation in New Zealand would have the same effect. It must be preferable to find our conflict of laws provisions for choice of law and international contracts set out clearly in a statute rather than have to 'hunt about' as is the present situation.³⁸

³⁶Williams op. cit. supra n.18 on p.454 at p.31.

³⁷Ibid.

³⁸On the difficulties facing New Zealand lawyers see infra at p.463.

PART E

NEW ZEALAND CONFLICT OF LAWS FOR
INTERNATIONAL CONTRACTS

Chapter I Introduction and some preliminary
 matters preceding legislation.

Chapter II 'The Solution'

Chapter I.

NEW ZEALAND CONFLICT OF LAWS FOR INTERNATIONAL CONTRACTSIntroduction

Traditionally English and Commonwealth Conflict of Laws for contracts have been regarded as the same. Hence "it is therefore more acceptable to cite commonwealth authority in English conflict of laws cases, and vice versa, than in other fields of law."¹ Other than the very occasional case cited by way of illustration it has been possible to state the New Zealand conflict of laws for international contracts by reference to English law alone.² The criticisms that were levelled at the English Proper Law Doctrine apply equally in the New Zealand setting.

With England being a member of the European Economic Community its ties lie more with Europe than elsewhere. This is especially so since the European Economic Convention on the Law Applicable to Contractual Obligations (1980) has started to influence the approach to choice of law in

¹Broken Hill Proprietary Co. v. Latham [1935] 1 Ch. 373 at p.399 per Maugham J. See also Prebble p.436 note 6 and R. Graveson. The Judicial Unification of Private International Law in De Conflictu Legum. 154 Neth. Int'l L. Rev. (1962).

²For other New Zealand decisions see P.R.H. Webb & F.M. Auburn. New Zealand Conflict of Laws - a Bird's Eye View. In Contemporary Problems in the Conflict of Laws. Essays in Honour of John Humphrey Carlile Morris. (1978) at p.271 et seq.

contract in European Economic Community countries.³ English conflict of law for contracts which will become European Economic Community Conflict of Law for Contract is no longer automatically appropriate for New Zealand to follow.

Furthermore domestic contract law both in England and New Zealand has been the subject of legislation in recent years. This has had the effect of producing a divergence in the domestic contract law of both countries. There could be said to be a parting of the ways in so far as the respective domestic contract law is concerned in the two jurisdictions and that this divorce will make its way into conflict of laws contract law.

The time has come for New Zealand to have its own Conflict of Laws rules for international contracts. The following points would indicate why change is now needed and why legislation is required.

1. It is no longer appropriate to automatically follow the law of a member of the European Economic Community.

³In Compagnie Européenne des Petroles S.A. v. Sensor Nederland B.V. (1983) 22 I.L.M. 66 at p.69, the Hague District Court held that 'although this Convention has not (yet) been ratified by the Netherlands, its Article 4 should already be applied as valid in Netherlands private international law.' C. McLachlan. The New Hague Sales Convention and the Limits of the Choice of Law Process. (1986) 102 L.Q.R. 591 at p.611 note 77, suggests that a similar situation is understood to apply in Denmark.

2. The Proper Law Doctrine in England could nevertheless be retained if it was a useful solution to the choice of law dilemma. As it is not, this is a suitable time to start afresh and adopt rules which avoid the problems inherent in the English approach.

3. International contracts are on the increase in New Zealand yet the subject of conflict of laws is not a compulsory subject for a law degree in New Zealand. There are no comprehensive New Zealand text books on the subject nor are there that many articles written which would help a practising lawyer. The law is thus hard to find. It may also be noted that New Zealand's major trading partners such as Japan may have very different laws from that of New Zealand. New Zealand statutes concerning contract law are far from helpful in conflict of law matters.⁴ Webb for example has asked if the Parliamentary Counsel could not bear in mind, for the future, that there is such a subject as the conflict of laws when drafting statutes pertaining to contract law.⁵ Not only are our contracts statutes unhelpful for New Zealand lawyers, they are also a potential nightmare for overseas lawyers.⁶ Our standing in the international community requires the law to be reasonably easy to find and equally easy to apply.

Finally it may be noted that legislation is becoming increasingly common in conflict of laws. Thus any New Zealand legislation would not be out on a limb

⁴See P.R.H. Webb. Heaven Help the Overseas Conflict Lawyers. (1979). N.Z.L.J. 442 and see *infra* at p.480 et seq.

⁵*Ibid* at p.444.

⁶*Ibid*.

as far as world trends are concerned.⁷

4. Legislation is necessary because of:

- (i) The unsatisfactory present English situation especially with regard to the third rule of the proper law doctrine.
- (ii) The rising importance of international contracts in New Zealand and in the world in general. In many respects the average New Zealand lawyer can be seen as being in an invidious position in comparison to his English or American counterpart in so far as he does not deal daily with international contracts. It is important that such lawyers, who may never have studied the conflict of laws be able to find and apply the law with certainty. This is especially so as international contracts become increasingly common in New Zealand.
- (iii) The decided lack of cases reported in both New Zealand and England make legislation necessary. International trade is developing at a pace that requires immediate action. Development by case law is too slow to cope with the situation.

⁷It was said in the Preface to the First Edition of Cheshire & North's Private International Law that one of the fascinations of private international law lies in the fact that "it has been only lightly touched by the paralysing hand of the Parliamentary draftsman." The Preface to the tenth edition notes that the fascination remains "but the paralysis is creeping, if not yet all pervading" and that many of the changes between the latest edition and its predecessor relate to legislation.

Legislation on an international level has also become an acceptable phenomenon. Whilst only the European Economic Convention on the Law Applicable to Contractual Obligations (1980) has been considered many other important recent conventions could have been discussed. See for example the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (1986) and discussion by McLaughlin *op. cit. supra* n.3 at p.59. *et seq.*, and also by M. Gilmore. International Trade (1987) 28 Harv. Int'l Law J. 526.

Some Preliminary Matters Preceding Legislation

The following matters need to be considered before any legislation is proposed.

1. The Ultimate Goal

The ultimate goal, probably unattainable, must be to have one body of substantive law to govern all international contracts. Any national legislation on the part of New Zealand should therefore endeavour to follow general world trends such as, for example, party autonomy. Change should not be sought for change's sake.

2. Compatibility with Existing Legislation

The proposed legislation should as far as possible also be compatible with our domestic contract statutes. This requires a brief consideration of the characteristics of our contracts acts including any choice of law provisions that may be suitable for retention.

3. Need to avoid present defects in the law

Any proposed legislation should be considered in the light of the present defects in the proper law doctrine. It is important that the criticisms levelled at the proper law doctrine do not apply to any alternative solution. Likewise any advantages in the American solution or academic opinions discussed above should be borne in mind.

4. Goals of the Conflict of Laws must be furthered

The proposed legislation should consider and not thwart generally accepted conflict of laws goals for

contract. This requires a brief consideration of the goals and aims themselves.

5. Rules versus approaches

An initial decision has to be made concerning the model to be chosen for the proposed legislation. The problem of whether rules or approaches provide the best model for this branch of the law must be discussed.

Only when these matters have been considered may the actual proposals be forwarded and tested against these criteria.

It is proposed to consider the last mentioned matter of rules versus approaches first. A consideration of goals follows. Thirdly New Zealand contract legislation is discussed. The remaining two matters (points 1 and 3 above) are considered after the proposed legislation has been outlined.

RULES VERSUS APPROACHES

The European Economic Convention on the Law Applicable to Contractual Obligations (1980) provided an example of a convention applying both general and specific rules. The general rule of allowing party autonomy contrasts with the specific rules for certain types of consumer and employment contracts. The Convention (in so far as Section 7 provides a kind of interest analysis) may also be seen as endorsing the "approach" system to conflict of laws.

It is often considered⁸ that the main question facing conflict of law scholars is whether rules or approaches are appropriate.

A 'rule' may be defined as a phenomenon found in most areas of the law, namely a formula which, once applied, will lead a court to a conclusion. Approach refers to a system which does no more than note what factor or factors should be considered in arriving at a conclusion.⁹

Interest analysis was cited as an approach. The difficulties inherent in such an approach, (and interest analysis can be said to be typical of approaches in general) have already been canvassed. Approaches are difficult to apply in practice, they can lead to uncertainty and confusion, increased litigation results, as does the length of time each case takes to be decided. Costs mount. The only advantage of using an approach such as interest analysis is that ultimately rules will emerge out of the chaos.¹⁰

⁸W.L.M. Reese. Choice of Law. Rules or Approaches. 57 Cornell L.R. 315 (1972).

⁹Ibid.

¹⁰Reese ibid. Reese, the Reporter for the Restatement (Second) Conflict of Laws for example considers that courts should progressively refine the principles of interest analysis so that eventually specific rules emerge. He would like to see a relatively large number of narrow rules each of which would be concerned with a particular issue or a group of closely related issues.

Thus some writers suggest that this rules versus approaches debate may be seen as moving in a circle. Beale's rules were over some decades annexed by the "free-wheeling dispensers of doctrinal and judge-made theory,"¹¹ and now the trend is back to rules.¹² "Modern" states such as New York are seen as rapidly building up a body of new case law and as this development progresses, it is seen as inevitable that what is a mere theory or approach today becomes the rule of tomorrow.¹³

The critics of rules tend to emphasise the lack of flexibility inherent in rules.¹⁴

"International contracts which hold such unpredictable combinations of fact and such a surprising variability in their local connections and relationships cannot be 'strait-jacketed into fixed rules.'"¹⁵

However rules may be divided into rules designed to apply in only a given situation or rules which are of general applicability. An example of the latter would be that the *lex fori* determine all choice of law issues. There is no reason why a number of rules could not apply. For example it is argued that the party autonomy rule should apply to all contracts which contain a choice of

¹¹R.B. Schlesinger. Book Review. 16 Am. J. Comp. Law 608 at p.612. (1968).

¹²A.A. Ehrenzweig. Private International Law. A Comparative Treatise. (1967) at pp.89-90.

¹³Schlesinger op. cit. supra n.11 at p.612.

¹⁴E.g. J.R. Leathers. Erie and its Progeny as Choice of Law Cases. 11 Houston L. Rev. 791 at p.823. (1974).

¹⁵Ibid.

law clause and the *lex fori* determine all contracts where the parties have not made an express choice of law decision. Two general rules can cover the entire area of choice of law for international contracts.¹⁶ Two general rules avoid the uncertainties inherent in approaches and avoid the difficulties which exist in specific rules. It is the problems that are associated with specific rules that must now be considered.

Jaffey¹⁷ has provided a number of specific rules which are presumably intended to be of general applicability. These may be summarised as follows:

1. If a governing law clause invalidates the contract then it should be disregarded.
2. A party should not be held liable to a greater extent than he is liable by the law of the country where he acted.
3. The party whose performance is the most complicated should have his law applied.¹⁸
4. In the event of unequal bargaining power the weaker party should have his law applied. However where a transaction is entirely domestic as regards one party that party should not be placed in a worse position than he would be under his own law.
5. Where no considerations of justice or convenience seem to point to one party's law rather than the other then the *lex fori* applies.
6. Public policy must always be considered. No foreign rule which grossly offends English standards of justice should be applied.

¹⁶Subject of course to certain qualifications discussed *infra* at p. 485 et seq.

¹⁷A.J.E. Jaffey. The Foundation of Rules for the Choice of law. (1982) 2 Oxford J. of Legal Studs. 368 at p.382 et seq.

¹⁸In the words of the European Economic Convention on the law Applicable to Contractual Obligations (1980), it is the person who is to render the "characteristic performance."

The difficulty with these rules is that they are easy to state but difficult to apply. How does a court decide which party has the most complicated requirements to perform and when are parties in unequal bargaining positions? Areas of grey are bound to exist. Such rules make the law too difficult to apply.

The same may be said for developing specific rules for specific situations. Not only do the specific rules have to be determined the specific situations also have to be established. Again areas of grey are likely to arise and again the law becomes complicated and difficult to apply.

The only viable answer is to have the two general rules as suggested above.

These two general rules will however require some qualification. This would be in line with established models. It is not possible for a legislator to foresee all situations and combination of facts therefore there is need for some "escape device".¹⁹

¹⁹Cavers in reviewing European Choice of Law legislation suggests there are three models emerging for legislation namely

- (a) the "classic model" a short seemingly simple provision designed to do duty over a wide spectrum of choice of law cases.
- (b) the "succinct basic rule" to which is attached a brief escape clause or concept designed to allow judicial discretion.
- (c) a set of rules designed with particularity to the points at which departure from the basic rule will be permitted, chosen with a view to alleviating some of the situations in which the basic rule has given rise to complaint.

See D. Cavers. Legislative Choice of Law: Some European Examples. 44 So. Cal. L. Rev. 340 at p.360 (1971) and D. Cavers. The Common Market's Draft Conflicts Convention

An escape clause can save legislation from the changes of petrification and help to meet the demands of Judge Cardozo²⁰ who said that

"The law, like the traveler, must be ready for the morrow. It must have a principle of growth."

It would therefore appear that two general rules with qualifications or 'escape devices' are an appropriate way to determine choice of law issues for international contracts.

on Obligations: Some Preventative Law Aspects. 48 S. Cal. L. Rev. 603 at p.626 (1975), and see generally F. Vischer. Drafting National Legislation on Conflict of Laws: The Swiss Experience. (Spr. 1977) 41 Law & Contemp. Probs. 131.

²⁰B.N. Cardozo. The Growth of Law (1924) at p.20.

GOALS

It has been said that

"... the pursuit of harmony is the principle task of those who make it their concern to think about private international law."²¹

The 'Ideal'

Ideally international trade and the international community would be served best by a truly international set of substantive laws which were uniformly interpreted by all jurisdictions. This would be the ideal. But

'the ideal is unattainable. All ideals are. Never shall we see the day when all countries will apply the same law to the same situation. This does not mean that we should give up pursuing the ideal....'"²²

If this is the ultimate goal any changes in the present conflict of laws for choice of law and international contracts should attempt to follow general world trends and adopt rules which are in harmony with both the goals and objects of current conflict of law ideas and contract law generally. It therefore becomes necessary to briefly consider the accepted goals in this field of law.

Predictability and Certainty

All would agree that predictability and certainty

²¹O. Kahn-Freund. General Problems of Private International Law (1976) at p.323.

²²Ibid.

are necessary.²³ The disagreement is over the question of whether these goals are possible in a situation where a contract has contacts equally divided amongst states. Predictability and certainty are achieved if party autonomy is respected.

Justice

A further goal, often discussed, is that of justice. This concept can mean no more than that the parties' expectations are given effect to or alternatively it can have a more profound connotation.²⁴

Uniform Solutions

Another goal that is cited relates to the attainment of uniform solutions.²⁵

²³See generally R.J. Bauerfeld. Notes. Effectiveness of Choice of Law clauses in Contract Conflict of Laws. Party Autonomy or Objective Determination. 82 Colum. L.R. 1659 at p.1669 (1982).
L. James. Effects of the Autonomy of the Parties on Conflict of Laws Contracts. 36 Chi-Kent L. Rev. 34; at pp.56-8 (1959).
M.J. Levin. Party Autonomy Choice of Law Clauses in Commercial Contracts. 46 Geo. L.J. 260 at pp.263-4 (1957).
F. Vischer. The Antagonism Between Legal Security and the Search for Justice in the field of Contracts. (1974) 11 Recueil des Cours 1.

²⁴See Jaffey op. cit. supra n.17. See also R. Graveson. Philosophical Aspects of the English Conflicts of Laws. (1962) 75 L.Q.R. 337 at p.355.

²⁵See Reese's opinion. Supra at p.467 note 8.

"In international transactions, particularly on commodity markets where the same shipment of goods may be bought and sold many times before delivery of the actual goods to the last buyer, it is of great commercial convenience that all the contracts relating to such sales should be subject to the same proper law, irrespective of the place of shipment or discharge, the residence or nationality of the parties or the place where the contract is made."²⁶

The proponents of this view argue that it is highly unsatisfactory if a case were to be decided according to different rules depending on whether it was brought before the courts of country A, B or C. This is because one tends to think of the parties' rights and duties as something that exist and which are capable of definition. Perhaps in truly international situations this is just not so and that despite Lord Diplock's views in Amin Rasheed²⁷ 'internationalised' contracts are coming into existence, which are not automatically subject to any particular legal system and which therefore require special international rules to govern them. If under the present English system it is really impossible to say which law is most closely connected to the contract, as indeed the Amin Rasheed case illustrates, then such cases are in a vacuum until some arbitrary decision as to which law is to govern, is made.

²⁶Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A. [1971] A.C. 572 at p.600 per Lord Diplock.

²⁷Amin Rasheed Shipping Corporation v. Kuwait Insurance Co. [1984] A.C. 50 at p.55.

To Uphold Bargains

One object of contract law is to hold people to their bargains;²⁸ this is part of the economic function of law. Efficiency is seen as important. One economic purpose of contract law is to facilitate exchange,²⁹ another to reduce the complexities and cost of dealings. Party autonomy is compatible with the economic analysis of law.

Wider Goals

Finally at a more general level are goals of wide concern. One has in mind the object of much consumer protection legislation in protecting the weaker party, and of laws that cut across contract law. Laws relating to gambling and Sunday closing, for example, promote the wider goals of society in maintaining peace and order whilst some legislation, the Statute of Frauds for example, concern both the parties to a contract and the wider interests of society in general in ensuring that fair play results.

Many other goals could be considered.³⁰ The difficulty is to decide where to draw the line. Goals of

²⁸See generally H.E. Yntema. The Objectives of Private International Law. (1957). 35 Can. Bar Rev. 721. and R.A. Posner. Economic Analysis of Law (1977) (2nd edit.) at p.67. The following goals or aims apply equally to domestic contract law generally.

²⁹Posner *ibid* at p.69 et seq.

³⁰Ease of judicial application, the goals of providing rational and functional decisions.

conflict of laws in general as opposed to those relating to contract conflict of laws could be considered; likewise the goals of domestic contract law are similarly potentially relevant. An enormous amount has been written on the subject.³¹ Obviously academic writers tend to emphasise the goals that enhance their own particular theory.³²

Conclusion

It is possible to draw two conflicting conclusions from these often stated goals.

First, one may argue that these aims, goals or policies can be classified into two general categories. The first aim is to strengthen certainty. This avoids unjust results and fosters predictability and party expectation. Whatever rules are adopted must thus foster this goal, and party autonomy does just this very thing.

However the wider concerns of society cannot be ignored. This leads one to the problem of the limitations that must be considered when the applicable law to govern

³¹See for example A. Von Mehren. Choice of Law and the Problem of Justice. 41 No. 2 Law & Contemp. Probs. 27 (Spr. 1977). For a summary of the goals that are advanced by party autonomy see T. Brown. Notes. Choice of Law Stipulations by Litigants. 43 Washington & Lee, L.R. 141 at p.144 (Winter 1984). See also A. Shapira. "Grasp All, lose All." On Restraint and Moderation in the Reformulation on Choice of Law Policy. 77 Colum. L. Rev. 248 (1977). See also the considerations stated by Yntema, Cheatham and Reese etcetera discussed in the context of interest analysis supra at p.188 et seq.

³²Jaffey for example would emphasise justice, as would Cavers. See The Choice of Law Process (1965) at pp. 31-2, 66-7, 89.

a contract is chosen. Overriding statutes of the forum, mandatory rules, and public policy considerations all must be considered.

The alternative conclusion is that the generally accepted goals of contract conflict of laws are irreconcilable.

"If one were to fuse together all the goals of and suggested approaches to choice of law, the result would be an overpowering and equally baffling edifice of assorted policy abstractions, ranging from the transcendental to the pragmatic."³³

A choice of law clause can be upheld and thus certainty vis à vis the parties themselves are concerned can be achieved or one can ignore the choice of law clause and obtain uniform results and predictability at a general level. It is a fault of the eternal and eternally insoluble dilemma of certainty of the law against fairness in the individual case. Flexibility, another oft cited conflicts goal, promotes fairness but it will always impair predictability.

This second conclusion does appear to be the more realistic. One is therefore left to choose the goal or goals that do not conflict with each other and formulate rules which enhance some goals but ignore others. Here again, it is very difficult to decide which goals must give way. Is Morris' view, that individual wishes must give way to nationally adopted international conventions

³³Shapira op. cit. supra n.31 at p.255.

preferable to the opinion of Mann who would consider party autonomy as the prevailing goal? Is it possible to have one set of goals covering all international contracts? The goal of upholding party expectations is not really pertinent to situations where parties have not made a choice of law decision.

It has been suggested³⁴ that instead of approaching the subject in terms of policies and goals it would be preferable to consider general guidelines. One such guideline would be the rule of simplicity.³⁵ Kahn-Freund points out that private international law is intellectually fascinating and asks if this is not in fact its main curse. "It is 'interesting'; it lends itself to many and highly complicated technical discussions. Is not law which is intellectually interesting almost always in need of reform?"³⁶ He therefore argues that the law should be simple.³⁷

³⁴Kahn-Freund op. cit. supra n.21 at p.320 et seq. Another guideline would be realism. See at p.321 et seq.

³⁵This of course can be considered as a goal. See Shapira op. cit. supra n.31 at p.253.

³⁶Kahn-Freund op. cit. supra n.21 at p.320.

³⁷If 'simple' is to be equated with ease of administration then some, such as Shapira, op. cit. supra n.31 at p.253 would contend that "The endeavor to create ease of administration in a legal field which is not endowed with the virtue of simplicity can only breed confusion and frustration."

Whether one calls them goals, policies or guidelines it would seem that a vast number exist, many of which are incompatible. The ideal would be to have no need for the subject of conflict of laws. Given that this is unobtainable any proposed rules or laws should for preference consider general world trends, enhance as many generally accepted goals as possible and strike a balance between inflexible rules and unfettered judicial discretion.³⁸

Before any changes can be suggested the conflict of laws provisions in our contract Acts should be considered to see if they contain any conflict of law rules which are worthy of retention. Also the general characteristics of New Zealand domestic law need to be briefly considered. If the recent legislation works well at a domestic level it is possible that it could be modified to assist in the conflict of laws dilemma. Proposed rules should as far as possible be in harmony with not only world trends but blend with domestic rules of New Zealand. At the end of the day the transaction is a contract and this should not be lost sight of when considering contracts which contain an international element.

³⁸Shapira op. cit. supra n.31 at p.251.

New Zealand Contract Legislation

The briefest review of our domestic contract³⁹ Acts reveals a lack of conflict of laws provisions. Webb⁴⁰ has discussed how unsatisfactory the legislation is in this regard for both New Zealand lawyers and litigants and their overseas counterparts. The only conclusion that may be drawn from our contract statutes is that they provide no useful guides or laws from a conflict of laws point of view for international contracts. As the legislature has seen fit to ignore, whether intentionally or inadvertently, the subject of international contracts, any proposed legislation in this field will not cut across any existing provisions. The proposed legislation can therefore ignore the New Zealand statutes from a conflict of laws point of view.

When the contracts acts are considered from a general point of view it may be said that our legislation gives the judge a wide discretion once it is established that the parties come within the orbit of the Act concerned.⁴¹ Thus our legislation contains rules⁴² as well as giving

³⁹The Frustrated Contracts Act 1944.
The Minors Contract Act 1969.
The Illegal Contract Act 1970.
The Contractual Mistakes Act 1977.
The Contractual Remedies Act 1979, and
the Contracts (Privity) Act 1982

⁴⁰See Webb op. cit. supra n.4 at p.442 et seq.

⁴¹See for example Section 9 of the Contractual Remedies Act 1979.

⁴²See for example Section 6 of the Illegal Contracts Act 1970.

the judge a discretion. The proposed legislation is in harmony with this approach. Party autonomy may be seen as the rule, the public policy exception the discretion. The scheme of the contracts acts has worked satisfactorily in New Zealand at the domestic level, there is no reason why it should not work in an equally acceptable manner for international contracts. If the rule that party autonomy prevail subject to a public policy exception be adopted the disadvantage of detailed rules would be overcome and the problems inherent in an unfettered discretion curtailed.

'The court shall give effect to a choice of law clause in an international contract' is a general rule that is easy to apply and not particularly open to a variety of interpretations. However a judge no doubt would feel obliged to resort to a strained interpretation if he felt the circumstances so warranted it.⁴³

If a proviso were added that this general rule of party autonomy was subject to the public policy of the forum the judge would be able to do directly and openly that which he would otherwise have to do indirectly. There would be no advantage in defining public policy because any definition which limits public policy might have to be redefined by the judge for a certain unforeseen

⁴³As judges have done when interpreting section 7 of the Illegal Contracts Act 1970. See Harding v. Coburn [1976] 2 N.Z.L.R. 577, Ross v. Henderson [1976] 2 N.Z.L.R. 589, Broadlands Rentals Ltd. v. R.D. Bull Ltd. [1976] 2 N.Z.L.R. 595.

situation. The judge faced with a general rule and an unfettered discretion can do directly and simply that which he would otherwise do by an indirect method. Legal fictions and tortious reasoning would be avoided. From the parties' point of view they know in advance the rule. Lawyers can advise clients and predict an outcome. The result is no longer the luck of the draw as can occur at present.

Thus it can be concluded that the proposed legislation does not conflict with any existing legislation and indeed may be seen as in harmony with general contractual principles.

Compatibility with current conflict of law theory and general contract theory. A Note.

Very briefly and very generally it may be said that present conflicts theory is towards a rational functional approach to choice of law questions. Any rules that are to be adopted should be in harmony with this practical approach.

If general contract theory is considered, then, at the risk of oversimplification there may be said to be two views about the relationship of contract to the law. One view, which Atiyah calls the 'will theory' places primary emphasis on the fact that the parties

⁴⁴P.S. Atiyah. The Rise & Fall of the Freedom of Contract. (1979) at p.405.

have made an agreement. "The autonomy of the free choice of private parties to make their own contracts on their own terms was the central feature of contract law."⁴⁵ The role of the court was to effect the parties' intention. The idea that the court had an independent role to play as a forum for the adjustment of rights, or the settlement of disputes was inconsistent with this approach. Another view may be called the 'delegated legislation theory'. Pursuant to this idea a contract exists only because a particular legal system provides that, subject to certain conditions, a contract may exist.⁴⁶ The proposed rules are not inconsistent with either theory. Both these theories assume that all contracts must be linked to a domestic system of law. The rules suggested below would continue to link international contracts with specific domestic systems of law. The proposed 'solution' may therefore be seen as erring on the cautious, one which in no way asks for revolutionary ideas to be adopted. It may be argued that international trade and the international community would be better served if a timely international set of substantive rules or laws was developed⁴⁷ but this, it is suggested, is for the future.

⁴⁵Ibid at p.408.

⁴⁶See McLachlan op. cit. supra n.3 at p.593 et seq.

⁴⁷See I.F.G. Baxter. International Conflict of Laws & International Business. (1985) 34 I.C.L.Q. 538, who argues that international business today is of such importance and volume that it needs laws and theory that are designed for it. He considers that it is not adequate to treat international conflict of laws in the area of multinational business as "interstate law in international garb." Ibid.

Some immediate alternative to the present system of the proper law doctrine is needed now in New Zealand.

Chapter II

THE SOLUTION

The Need for Two Rules

International contracts which contain a governing law clause cannot be treated in the same manner as international contracts which do not contain such a clause.

It has been argued that to divide contracts into different types of contracts is doomed to difficulty.¹ However this initial division should not lead to problems. The only possible grey areas are in cases such as Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A.² where it will be recalled³ the chosen law was the law of the flag but a number of vessels had been used making the choice of law clause somewhat difficult to ascertain. If such a clause can reasonably be given a meaning then it should be classed as an international contract containing a choice of law clause and dealt with as such. Only if no meaning can be attributed to the words whatsoever should it be treated otherwise.

¹See the discussion on adhesion contracts supra at p.368 et seq.

²[1971] A.C. 572.

³See supra at p.351.

The definition of 'international' contracts given at the beginning of this thesis⁴ should, except for one detail,⁵ be applied to contracts with and without a choice of law clause. An international contract should be defined as one which has 'significant elements connected with more than one jurisdiction.'⁶

International Contracts which contain a choice of law clause.

Party Autonomy prevails

"The simplest solution, undeniably would be if all courts were allowed to apply their own laws, laws with which they are intimately familiar. One could then completely dispense with this troublesome discipline called private international law. When we wish, all the same, to require a judge to apply foreign law, he ought to be able to cite positive reasons for such action."⁷

⁴See supra at p.5.

⁵The term 'jurisdiction' is preferable to the term 'country' as the latter tends to emphasise geographic contacts as discussed supra at p.64 et seq.

⁶This is a very wide definition, only a wholly domestic contract that contained a choice of law clause would not be included because although a choice of law clause could be seen as one significant element there would be no others, and the definition requires a minimum of two significant elements.

⁷S. Braekhus. Choice of Law Problems in International Shipping. (1979) 111 Recueil des Cours, 255 at p.268.

A judge should apply foreign law when the parties exercise their option to choose such a law to govern their contract. It is not proposed to reiterate in detail the advantages and reasons for such a course of action. It is hopefully apparent that party autonomy makes for certainty and predictability. It upholds the parties' expectations. It is generally recognised in all conflict of law systems.⁸ It should be as absolute as possible and whilst Cheshire would turn in his grave, a Brazilian who sells coffee to a Japanese may provide that the contract shall be governed by Danish law.⁹

Party autonomy is in accord with recent international legislation.¹⁰

It would seem common, indeed the norm, in large commercial transactions with transnational or international connections to automatically include a choice of law clause. The larger, the more complicated, the more truly international the contract the more likely is the presence of a choice of law clause specifying the law of some sophisticated commercial centre such as New York or London to apply.

⁸R.J. Weintraub. Functional Developments in Choice of Law for Contracts. (1984). iv Recueil des Cours 243 at p.289 suggests that it would be tilting at windmills to try and halt the vogue of party autonomy.

⁹Cheshire viewed such an idea with horror. See Cheshire at p.36 note 2.

¹⁰E.g. Section 3. The European Convention on the Law Applicable to Contractual Obligations (1980). See also United Nations Convention on Contracts for the International Sales of Goods. The autonomy principle is considered by R.D. Kearney. Developments in Private International Law. 81 Am. J. of Comp. Law 724 at p.728 (1987).

The various limits on party autonomy were discussed above. These should be kept to the barest minimum. Commercial convenience requires such a course of action. Parties must be able to rely on the court upholding their choice. Thus parties should be free to choose a law at any time, *dépéçage* should be allowed,¹¹ a choice could 'float', and parties could change their choice at any time.¹² The European Economic Convention on the Law Applicable to Contractual Obligations (1980) law in this respect could be adopted.

If an invalidating choice of law clause has been made this should likewise be upheld. Thus the present English position should be maintained.

By allowing complete and unfettered party autonomy two consequences should emerge. Upholding choice of law clauses will promote their use. The aim should be for all written contracts to contain such a clause. Secondly by always upholding such clauses efficiency will result in so far as certainty and predictability will be achieved. Parties seeing these advantages will therefore be more inclined to use such a clause.

Party autonomy is in line with current conflicts theory. It is a common sense practical solution. It is

¹¹This is in harmony with recent English cases. See Libyan Bank v. Bankers Trust [1988] Vol. 1 Lloyds Law Rep. 259 at p.271 where Staughton J. said "It is possible, although unusual, for a contract to have a split proper law." See also Vesta v. Butcher [1986] Lloyds Law Rep. 179 at p.193 where Hobhouse J. said "It has been recognised for a long time that parties may choose that different parts of the contract should be governed by different laws."

¹²Subject to the same limitations as apply in the

also compatible with the general idea of contract law that persons should be held to their bargains. A choice of law clause is part of the contract; it should be upheld in the same manner as any other term of the contract.

There appears to be only one difficulty, and this relates to the conflict between party autonomy and all its attendant advantages and the wider interests of society as a whole. Two situations or areas of conflict are involved. A judge could be faced with a choice of law clause which would apply a law contrary to the public policy of the forum. Alternatively some law, usually a legislative law of the forum, or another state, could apply to the contract. Is the judge to uphold the party autonomy or the otherwise applicable rule?

The first situation will cause little difficulty. The proposed legislation should be drafted in such a way as to allow a public policy exception to party autonomy.

English and New Zealand courts have, traditionally, been diffident about applying public policy unless some fundamental standards of morality, justice or welfare are involved or human rights are at stake.¹³

New Zealand judges are only likely to evoke such a principle in those cases where objection to the foreign

European Convention on the Law Applicable to contractual Obligations, 1980. See *supra* at p.410 et seq.

¹³F.A. Mann. Uniform Statutes in English Law. (1980) 99 L.Q.R. 376 at p.399 and see also R. Graveson. The Inequality of the Applicable Law. (1980) B.Y.B.I.L. 231 at p.236.

law is not technical or trivial but very serious and substantial. One could employ the term "manifestly incompatible with New Zealand public policy"; but this would not probably be necessary.

Carefully used, as it is suggested it would be used by New Zealand judges, public policy could be an 'escape device' in that very rare case where the judge did not wish to keep the parties to their bargain. Whilst one cannot think of many examples it should not be discounted on the principle that one cannot foresee and anticipate every situation which will occur. Illegal contracts are the obvious group of contracts that will be affected by the public policy limitation and these should be relatively infrequent.

It was suggested above¹⁴ that choice of law clauses should prevail and the choice of law applied rather than any mandatory rule in force in the forum or existing in a third state. The only exception to this basic rule would arise when the relevant legislation expressly stated that the rule was to apply in preference to the parties' chosen law or it was a necessary implication that such should occur. Foreign mandatory rules unless concerning New Zealand public policy were to be ignored. This solution is in harmony with present English law and was seen as a happy compromise. Party autonomy is preserved and yet the legislative intent is not ignored and the judge is not faced with the difficult problem of determining what constitutes a mandatory rule. As party autonomy is still paramount all the innumerable advantages accompanying the doctrine are retained.

¹⁴See supra at p.434 et seq.

Some Grey Areas

The aim is to promote and encourage the use of choice of law clauses. The rules developed should foster this goal. Thus parties who do not take advantage of their existence should not be encouraged in their attitude. For this reason it is suggested that the court should not enquire into the parties' intentions if they had not made an express choice of law decision. To do so would leave the parties believing that there was no need to actually include a choice of law clause because the court would do that for them anyway. Hence contracts should be strictly divided into those containing express choice of law clauses and those that do not. This leaves the problem of contracts which contain no choice of law clause but nevertheless include a choice of forum clause and/or an arbitration clause.¹⁵

It is suggested that a choice of forum clause should be equated with a choice of law clause (unless of course a choice of law clause is present anyway). Thus a valid choice of forum clause will result in the forum's law being applied. The advantage of this approach is that certainty, ease of application and party expectations are achieved. It could be an irrebutable presumption. The only disadvantage that is obvious is that the use of a presumption is introduced which is contrary

¹⁵International commercial arbitration has become very common, especially in major centres such as London, New York and Paris. There are said to be over 7000 new international commercial arbitrations yearly in London, and a clause for arbitration is to be found in a great many shipping and transnational contracts.
I.F.G. Baxter. International Business and Choice of Law (1987) 36 Part 1. I.C.L.Q. 92 at p.96.

to current ideas.¹⁶ However this would be an irrebuttable not a rebuttable presumption.

Likewise the choice of arbitration in a particular forum should, absent an accompanying choice of law clause, be viewed as a definite choice of that country's law. This would also achieve certainty, ease of application and party expectation. Commercial convenience and practice would seem to require such a course of action.

The disadvantage (which applies to both forum selection clauses and arbitration clauses) is that if such clauses are equated with choice of law clauses parties will not be encouraged to use the latter device. Perhaps however parties will see the advantages of including both a forum selection clause and a choice of law clause.

The use of such documents as a Lloyds standard form policy however should not be taken to mean that English law was intended. This would reintroduce the unacceptable second rule of the proper law. The use of such or similar forms without an accompanying choice of law clause would mean that the contract would be decided by the *lex fori*, as a case falling within the category of contracts that do not contain an express choice of law clause. However these types of standard form contracts do generally contain choice of law clauses, so the problem should arise but rarely.¹⁷

¹⁶See *supra* at p.60.

¹⁷See however *Vesta v. Butcher* [1986] 2 Lloyds Law Rep. 179 and *Du Pont v. Agnew* [1987] 2 Lloyds Law Rep. 585.

Another problem concerns the situation where more than one contract is involved in the transaction. If one contract specifies a governing law and another closely related contract is silent on the matter the courts tend to hold that the chosen law governs both or all of the contracts.¹⁸

In two recent decisions¹⁹ the court applied the second rule of the proper law to arrive at this conclusion. Both cases also concluded that had the third test or rule of the proper law been applied the same result would have been achieved.

Obviously if the *lex fori* is going to apply in the absence of a stipulated choice of law then a different result will obtain unless the contract specifying a governing law had chosen forum law.²⁰ For example in J.M.L. Contractors v. Marples Ridgway²¹ the main contract was subject to Iraqi law whilst the sub-contract contained no choice of law provision. Mervyn Davies J. considered

¹⁸J.M.L. Contractors v. Marples Ridgway (1985) 31 Build. L.R. 100.
Dimskal Shipping Co. S.A. v. The International Transport Workers Federation (The "Evia Luck") [1986] Vol.2 Lloyds Law Rep. 165. Vesta v. Butcher [1986] Vol.2 Lloyds Law Rep. 179.

¹⁹J.M.L. Contractors v. Marples Ridgway (1985) 31 Build. L.R. 100 and The "Evia Luck" [1986] Vol.2. Lloyds Law Rep. 165.

²⁰As in the "Evia Luck" [1986] Vol. 2, Lloyds Law Rep. 165.

²¹(1985) 31 Build. L.R. 100.

that "one is virtually obliged to impute an intent that the sub-contract is to be governed by Iraqi law"²² but that even if the third rule of the proper law applied Iraqi law would still be the law most closely connected with the sub-contract. The reason for this was that the sub-contract was expressly linked with the main contract and the main contract was governed by Iraqi law.²³

This type of reasoning will mean that virtually all transactions that contain more than one contract will result in the chosen law being applied to the other contract or contracts. This can provide difficulties. In Vesta v. Butcher²⁴ for example the original insurance contract was, on the closest and most real connection test governed by Norwegian law. Hobhouse J.²⁵ initially concluded that the reinsurance contract was also governed by Norwegian law and then noted that "there remains something surprising and improbable about the conclusion that the Lloyds ship and the Lloyds policy is governed by anything other than English law."²⁶ He resolved the dilemma "ingeniously"²⁷ by the use of *dépécage*.

If the *lex fori* applied in the absence of party choice Hobhouse J. in Vesta v. Butcher²⁸ would have avoided any

²²Ibid at p.115.

²³Ibid.

²⁴[1986] 2 Lloyds Law Rep. 179.

²⁵Ibid at p.193.

²⁶Ibid.

²⁷All E.R. Annual Review 1986 at p.67.

²⁸[1986] 2 Lloyds Law Rep. 179.

difficulties. Both contracts would have had English law to govern, and the plaintiff would have failed.²⁹ Hobhouse J. considered it "commercially unrealistic for reinsurers to rely on our English law consequence which forms no part of the scheme of insurance which is being provided...."³⁰ However once again the point must be made that the insurers and reinsurers could have included a choice of law provision. Secondly English law could equally have been chosen as the law most closely connected with the reinsurance contract, Hobhouse J. admits "powerful arguments"³¹ were advanced in favour of English law. Thus one party's expectations would be furthered by application of English law.

Similarly in J.M.L. Contractors v. Marples Ridgway³² it would not be unsatisfactory to have Iraqi law govern the main contract and English law the sub-contract. Again the parties could have chosen a law themselves, they could have specified English law and indeed the plaintiffs advanced a number of reasons why English law should be regarded as the proper law.³³ The use of an arbitration

²⁹The plaintiffs sought an indemnity under the reinsurance contract. The defendants repudiated liability alleging breach of one of the conditions of insurance. By Norwegian law, breach of that condition was not a defence to liability, but by English law it was.

³⁰Ibid at p.194.

³¹Ibid at p.192.

³²(1985) 31 Build. L.R. 100.

³³Ibid at pp.109-10.

clause³⁴ requiring disputes to be determined by the President for the time being of the Institute of Civil Engineers could be considered a presumption in favour of English law.³⁵

To summarise, the application of the chosen law or the *lex fori* does not produce unacceptable results when applied to actual fact situations. Furthermore these rules make for certainty and predictability which at present is absent in the law.

Conclusion

It is recommended that an Act be passed in New Zealand to implement the choice of law provisions discussed above. The Act could be entitled The Conflict of Laws (Contracts) Act. It is recommended that international and interstate contracts be defined in the manner suggested above.³⁶ The basic provision should be drafted in the following or like manner.

Parties to an international³⁷ contract may agree upon a law to govern their contract or any part thereof. A New Zealand court shall apply the law thus chosen by the parties unless:

³⁴Ibid.

³⁵Discussed supra at p.49 et seq.

³⁶Supra at p.5.

³⁷The definition is wide enough to include an interstate contract.

- (a) to do so would result in application of a law which is repugnant to public policy in New Zealand or
- (b) an enactment expressly provides or its object clearly requires application of a different law.³⁸

Either the use of the words "the parties must agree" could be sufficient to deal with adhesion contracts or a clause (c) could be inserted to read:

or

- (c) The choice of law clause was obtained by fraud, undue influence, overweening bargaining power or duress.

In the event of any of the abovementioned situations occurring to defeat application of the chosen law the court will require to know what law to apply in its place. This can only be the *lex fori*. It is a law of last resort and hopefully will have to be used with increasing infrequency. Application of any other law has greater disadvantages; the *lex loci contractus* and *solutionis* are not suitable and the difficulties in establishing the law most closely connected with the contract is too difficult and quite often pointless anyway. The relevant clause could read:

³⁸The use of the word 'enactment' suggests common law rules are not included. Common law rules will be caught in paragraph (a). Secondly the use of the term 'an enactment' as opposed to any New Zealand enactment' allows the judge to consider foreign legislation should he so wish. The use of the term 'their contract' suggests third parties are not affected. This is in conformity with current conflicts thinking.

A New Zealand court shall apply the domestic law of New Zealand to any contract to which subsections (a) (b) or (c) above apply.

Other possible clauses³⁹ would include:

1. A choice of the laws of a jurisdiction shall be read as a reference to its internal laws excluding its conflict of laws rules.
2. A New Zealand Court shall always apply the laws of New Zealand to matters of procedure and evidence.

These two clauses are reasonable limitations on the doctrine of party autonomy.

International Contracts which do not contain a Choice of Law Clause.

"It is a source of never-ending surprise to me that businessmen experienced in international trade as well [as] their legal advisers frequently enter into complex agreements with multitudinous international ramifications and involving large sums of money without taking the simple precaution of choosing the law which they wish to govern their transaction."⁴⁰

³⁹This thesis has only dealt with international contracts generally. It was considered to be beyond the scope of the thesis to include specific types of contracts. Obviously specific rules will have to apply to certain specific contracts. For example the *lex situs*, the law of the site of the immovable could apply to contracts concerning immovable property. These types of specific rules could be incorporated into a general conflict of laws statute or left to common law development.

⁴⁰C. Forsyth. *Enforcement of Arbitral Awards, Choice of Law in Contract, Characterization and a New Attitude to Private International Law.* (1987). V. 104(1) S. Af. L.J. 4 at p.14.

The Lex Fori Applies

International contracts which do not contain a choice of law clause represent the hard cases. Hopefully with time, their number will decrease as more and more parties become aware of the advantages of choosing a law to govern their dealings. However there will always be a need for a rule to govern in the absence of choice.

Again it is not intended to reiterate all the disadvantages of the present and proposed laws but rather to suggest a possible solution that could be adopted in New Zealand. There can be no ideal solution in this area, the attempt can only be to choose the best amongst a number of possibilities.

New Zealand could continue with the third rule of the proper law but the disadvantages of this have been shown to be considerable. The European Convention on the Law Applicable to Contractual Obligations (1980) suggests an alternative possibility.⁴¹ Again this test would be difficult to apply and contains exceptions which could easily reduce the test to the third rule of the proper law. Interest analysis is another possibility open to New Zealand to adopt but again the disadvantages far outweigh any benefits which could result from its adoption. A return to the *lex loci contractus* or *lex loci solutionis* would obviously not be appropriate in today's commercial world.

⁴¹Article 4.

If an alternative method is to be adopted the goals and objectives of contract conflict of laws must be considered. Some academic writers take the view that parties will still want to know what law will govern their contract thus emphasising party expectation and predictability.⁴² It was argued above⁴³ that if the parties have not exercised their option by choosing a governing law then their wishes could be ignored. They had their opportunity; it is too late now to complain if a choice is made for them.

The solution needs to be commercially convenient or expedient. A rule which is easy to apply is called for, one which all concerned will be able to use to predict which law will govern the contract. The only possible rule is that the *lex fori* should determine the matter.

Application of the Lex Fori in Absence of Party Choice

Justification

"Ye shall have one manner of law, as well for the stranger as for one of your own country."⁴⁴

If the *lex fori* applies commercial convenience and predictability are fostered. Justice is also achieved

⁴²E.g. A.J.E. Jaffey. Choice of Law in Relation to Ius Dispositivum with Particular Reference to the E.E.C. Convention on the law Applicable to Contractual Obligations. North. Chapter 2 at p.33.

⁴³Supra at p.129 et seq.

⁴⁴Leviticus. 24:22.

The governing law can be identified with certainty.

The lex fori approach has been justified upon a number of grounds.⁴⁵

1. General Importance

First the general importance of the lex fori can be emphasised in the conflicts process as a whole.

Four points may be made here:

- (a) Matters of procedure are determined by the lex fori.⁴⁶ What amounts to procedure may vary according to the jurisdiction deciding the matter.⁴⁷ To this extent one can say that choice of forum also amounts to a choice of law with regard to questions of procedure.
- (b) The lex fori determines the connecting factor,⁴⁸ and the connecting factor determines the lex causae.⁴⁹ 50 In other words the forum determines which law governs the agreement; the lex causae is determined in accordance with the rules of the lex fori.

⁴⁵See generally Ehrenzweig views considered supra at p.185 et seq.
A. Shapira. "Grasp All, Lose All" On Restraint and Moderation in the Reformulation on choice of law policy. 77 Colum. L.R. 248 (1977).
Jaffey op. cit. supra n.42 R.A. Sedlar. Babcock v. Jackson in Kentucky. 56 Kentucky L.J. 27 at p.85 et seq. (1967-1968). See also the views of Currie and Cavers discussed supra at p.168 et seq.

⁴⁶See supra at p.367.

⁴⁷For example the Statute of Frauds 1677 could be considered as procedural or substantive. See Leroux v. Brown (1852) 12 C.B. 801.

⁴⁸Morris at p.10. See also O. Kahn-Freund. General Problems of Private International Law. (1976) Chapter X at p.242 et seq.

⁴⁹Ibid.

⁵⁰The connecting factor is the legal concept which

(c) Characterisation is a matter of the *lex fori*.⁵¹

A matter must be characterised or classified or defined as, for example, contractual before the relevant conflict of law rules can apply. Considering the importance of the question it is surprising that there are not more reported decisions on this matter. Prebble⁵² suggests that the main grey area is between contracts and torts.⁵³

(d) Generally a court considers the content of foreign law a question of fact which must be proved by the litigant relying on it.⁵⁴ If

determines what is to be the *lex causae*, and the *lex causae* is the law which governs the actual issue. See Morris at pp.9-10.

⁵¹See Morris at p.481 et seq. and see Laconian Maritime Enterprises Ltd. v. Agromar Lineas Ltd. 1986 (3) S.A. 509 (D. & C.L.D.)

⁵²Prebble at p.454.

⁵³Riverstone Meat Co. Pty v. Lancashire Shipping Co. [1961] A.C. 87 provides a good example of the problems of characterisation. The House of Lords held a Hague Rules carrier responsible for faults committed by a shipyard which had had a vessel for repair. The faults had made the vessel unseaworthy and resulted in damage to the cargo. Braekhus at p.329 notes that the English courts saw the case as a question of construction of the Hague Rules whilst by Scandinavian law the same problem would most likely be seen as a question of the scope of the shipowner's vicarious liability. Lord Keith of Avonholm said "The question is not one of vicarious liability at all." [1961] A.E. 807 at p.871. This is answered by general rules of maritime law; it is not dealt with by the Hague Rules. See Braekhus op. cit. supra, n.7 at p. 329 et seq.

⁵⁴For English authority see Morris at p.37 et seq. For New York law regarding judicial notice of foreign law see N.Y. Civ. Prac. R. Rule 4511 (McKinney 1963).

the party does not prove the foreign law it is taken to be the same as the domestic law of the *lex fori*. The *lex fori* is therefore applied by default, as it were.⁵⁵

2. Ease and Simplicity

Secondly the *lex fori* is easy and simple to apply in comparison with application of foreign law. However to apply the *lex fori* is considered parochial by many who consider the aim is to obtain an 'international' result for a contract containing a foreign element. Baxter⁵⁶ has pointed out that the present English system does not achieve this. The court either applies the law of one of the parties or foreign law. In the former situation all that can be said is that one party is subject to a domestic rule which is not his own - hardly an international result. If the court decides to apply foreign law, then a whole host of difficulties arise.

The foreign law must be pleaded and proved, often at considerable inconvenience and expense. There may be more than one expert thus involving the court with a conflict of testimony. The point of law involved may be doubtful in the foreign law, it might even be a novel point of law yet the forum court has to elicit the rule of decision.

⁵⁵Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale [1967] 1 A.C. 361 is explicable on this ground. See *supra* at p.49.

⁵⁶Baxter *op. cit.* *supra* n.15 at p.109 et seq.

In Vesta v. Butcher⁵⁷ for example Hobhouse J. pointed out that the witnesses on Norwegian law were handicapped by the fact that there was very little established Norwegian law on reinsurance. They were therefore each having to express opinions on questions untested by any judicial decision.⁵⁸

Furthermore there is always the likelihood that a forum judge will examine a foreign legal system through and under the influence of his own legal system,⁵⁹ and will fail to appreciate the different methods of working of foreign courts and lawyers.⁶⁰ The whole process may therefore be described as 'hit and miss.'⁶¹

⁵⁷[1986] 2 Lloyds Law Rep. 179.

⁵⁸Ibid at pp.186-7.

⁵⁹Braekhus op. cit. supra n.7 at p.293 gives the example of the attitude of the English judges towards American legislation in the period before England adopted its Carriage of Goods by Sea Act 1924. See in re Missouri Steamship Company 42 Ch.D. 321 (1889). England, at this period, had complete freedom of contract. In Massachusetts legislation would have prevented the carrier from limiting his liability. Braekhus points out that English judges were reluctant to employ such mandatory rules in their own jurisdiction.

⁶⁰Baxter op. cit. supra n.15. See also A.A. Ehrenzweig. *Psychoanalytic Jurisprudence* (1971) at p.140.

⁶¹Baxter ibid at p.110.

Thus it may be argued that it is easier to apply the lex fori and any attempt beyond this is likely to result in application of a foreign law that is forum coloured.

3. Natural Preference for the Lex Fori

Thirdly there is a natural tendency to prefer one's own law. "... the judicial tendency to apply the judge's own law has always been strong ... All over the world, judges are inclined to apply their own law wherever they can...."⁶² This has been observed to exist on both sides of the Atlantic.⁶³ Prebble⁶⁴ considers that the difference between the two jurisdictions lies in the fact that American judges tend to be more open about it than their English counterparts.

⁶²O. Kahn-Freund. *The Growth of Internationalism in English Private International Law*. (1960) at p.13. See also Shapira op. cit. supra n.45 at p.255 who likewise suggested that courts everywhere have always displayed an instinctive inclination to resort to local law even in cases entailing foreign ingredients.

⁶³See J.R. Lowe. *Choice of Law Clauses in International Contracts. A Practical Approach*. 12 Harv. Int'l L.J. 1 at p.6 (1971). See also Prebble at p.474. Also O. Kahn-Freund. *Reflections on Public Policy in the English Conflict of Laws*. (1953). 39 Grotius 39 at p.45; Baxter op. cit. supra n.15 at p.109 footnote 54.

⁶⁴Prebble *ibid*.

Prebble⁶⁵ makes the point that as the rules for finding the proper law are somewhat amorphous there is certain scope, here, if anywhere, "for judicial rationalization of an unexpressed prejudice in favour of the lex fori."⁶⁶ Furthermore the formlessness of the English contractual choice of law rules not only make it potentially easy for concealing forum favouring, it also makes it difficult to prove or disprove that any such hidden process exists.⁶⁷

4. Achieves Justice

Fourthly, the point has often been made that the interests of countries are not involved in the decision of contractual disputes.⁶⁸ Rather it is the duty of the forum to determine the matter according to its ideas of reason and justice and this will probably lead to application of the lex fori.

5. Effects Legislative Intent

Fifthly, it is also argued⁶⁹ that there is no reason to restrict legislative intent to wholly domestic

⁶⁵Ibid.

⁶⁶Ibid.

⁶⁷It is therefore probably correct to say that English courts do apply English law in the majority of contract conflict cases. Prebble *ibid* at p.475.

⁶⁸See Jaffey *op. cit. supra* n.42 at p.33 and Shapira *op. cit. supra* n.45 at p.256

⁶⁹Shapira *ibid* at p.257.

situations. Just because a situation involves a foreign element does not mean that the local rules cannot still apply.⁷⁰

6. Accords with Recent Legislation

It may also be noted that all modern legislation whether national or international has forum favoring aspects. The New York Uniform Commercial Code and the European Economic Convention on the Law Applicable to Contractual Obligations (1980) for example both contain forum favoring tendencies.⁷¹ Likewise interest analysis resorts to the *lex fori* to a not insignificant degree.⁷²

⁷⁰Sedler has suggested for example that the courts have misconceived the judicial function in conflicts cases. It is not necessary to adopt a rule for all cases, particularly not a comprehensive system of rules designed to solve all conflicts problems that may arise. All that is necessary is to decide whether the law of the forum should be displaced in the particular fact-law pattern before it. The *lex fori* should be displaced, Sedler argues, when the legitimate expectations of the parties demand it; policy and fairness rather than abstract and analytical doctrine are to prevail. See R.A. Sedler. Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the New Critics. 34 Mercer L.R. 593 (1982-1983).

⁷¹See supra at p.217 for the New York Uniform Commercial Code and its forum favoring tendencies. The E.E.C. Convention on the Law Applicable to Contractual Obligations (1980) considers forum public policy and forum mandatory rules. See supra at p.434 et seq. See also G.R. Delaume. The European Convention on the Law Applicable to Contractual Obligations: Why a Convention? 22 I. Virg. J. of Int'l L. 105 at p.111 (1981).

⁷²See supra at p.159 et seq.

7. Fulfills Party Expectations

If one takes a more benevolent view towards the litigants than that suggested above⁷³ there are at least two reasons why application of the lex fori is satisfactory from their point of view.

First, if no choice of law clause exists then whichever party chose the forum could reasonably be taken to expect that the lex fori was likely to apply. The lex fori thus upholds at least the expectation of one party.

Secondly, it may be noted that frequently the lex fori is the local law of one of the parties. It has been suggested⁷⁴ that parties do not choose governing law clauses which give them the most advantage. This is a fiction; rather the parties prefer their 'own' law, the law of the jurisdiction in which they reside and do business. "This desire is usually not based on any deep knowledge of the law, but rather on a vaguely felt preference for dealing with what appears to be familiar rather than the unfamiliar."⁷⁵

⁷³Supra at p.127.

⁷⁴Gruson Governing Law Clauses at p.325 and L. Nurick. Choice of Law Clauses in International Contracts. 54 Proceedings - Am. Soc'y of Int'l Law 56 at p.57 et seq. (1960).

⁷⁵Gruson ibid.

Transferred into the no express choice category this will mean that if the parties had thought about the matter they might well have chosen the lex fori anyway.

Disadvantages of the Lex Fori

Three disadvantages are generally cited when considering this 'homeward' trend; this 'parochial', 'chauvinist' and 'provincial' approach.⁷⁶ The first is that application of the lex fori promotes forum shopping and the second disadvantage given is that this rule does not make for uniformity. Thirdly the rule is considered parochial.

1. Uniformity

The problem of uniformity may be considered first.

"This favor legis fori will always stand in the way of international harmony or uniformity and will therefore be obnoxious to an academic lawyer's desperate sense of tidiness..."⁷⁷

It is argued that it is unsatisfactory to apply the lex fori because different results could obtain depending on which forum is chosen. Jaffey⁷⁸ notes that if the desire for uniformity excludes the lex fori as the governing law, it does not however indicate any particular law as the appropriate one to govern. "So long as uniformity

⁷⁶See Shapira op. cit. supra n.45 at p.250.

⁷⁷Kahn-Freund op. cit. supra n.62 at p.13.

⁷⁸Jaffey op. cit. supra n.42 at p.36.

is concerned any law will do, so long as the courts of enough countries will apply it."⁷⁹ This can only be achieved by means of international conventions. Furthermore it should be noted that if this lack of uniformity is to be a criticism of the application of the *lex fori* then it should be equally applied to situations where parties have included a choice of law clause. If one takes the example of a New Zealand company selling mutton to a New York company no objection would be made if the choice of law clause specified that New York law was to govern. If one takes another New Zealand company also selling mutton to a New York company no objection would be made if the choice of law clause specified that the law of New Zealand was to govern. Uniformity is not achieved any more than if the *lex fori* was applied. It is illogical therefore to criticise in one situation but not another.

It may also be argued that to aim for the goal of 'uniformity of result' is "misguided from the outset."⁸⁰ The diverse material characterising conflict of laws problems is bound to defy any such attempts.

2. Forum Shopping

A further criticism levelled at application of the *lex fori* concerns forum shopping. Forum shopping has been defined as a "plaintiff by-passing his natural forum and bringing his action in some alien forum which would

⁷⁹Ibid.

⁸⁰Shapira op. cit. supra n.45 at p.260 takes this view.

give him relief or benefits which would not be available to him in the natural forum."⁸¹

The fear of forum shopping has played an important role in choice of law methodology. However the point has been made⁸² that the actual possibilities of effective forum shopping have been exaggerated. Such non legal matters as long distance travelling and non familiarity with foreign languages and customs for example act as a natural barrier to forum shopping. New Zealand's geographic isolation is particularly relevant here.

Braekhus⁸³ makes the point that scholars view forum shopping in a derogatory way whilst "attorneys speak of the noble art of forum shopping." It is difficult to understand why so many academic writers take exception to forum shopping and why attempts to limit it are canvassed. No one objects to forum selection clauses which are really only a form of forum shopping. Both parties agree that a particular forum shall be the venue for any litigation; they obviously choose a court that they consider will be the 'best' from their point of view. If a party takes the same course after a dispute has arisen he risks being accused of forum shopping. The other party is hardly

⁸¹Boys v. Chaplin [1971] A.C. 356 at p.401 per Lord Pearson. See also R. Schuz. Controlling Forum-Shopping: The Impact of MacShannon v. Rockware Glass Ltd. (1986) 35 I.C.L.Q. 374 and A. Shapira. The Interest Approach to Choice of Law at pp.38,45 et seq. (1970).

⁸²Shapira *ibid* at p.45 et seq. R. Kramer. Interest and Policy Clashes in conflict of Laws. 13 Rutgers L. Rev. 523 at p.560 (1950).

⁸³Braekhus *op. cit.* supra n.7 at p.266.

in a position to complain for (as with governing law clauses) he had his opportunity. He could have refused to enter the contract without the benefit of a choice of forum clause. Now he should have to accept the other party's choice of forum and its laws.

3. Parochialism

Besides the arguments concerning uniformity and forum shopping any reference to the lex fori is bound to lead to accusations of "parochialism, chauvinism or sloth."⁸⁴ The retort must be that the overall characteristic of the proposed choice of law provisions for international contract is far from adopting a mindless homeward trend. A New Zealand court will uphold autonomy; the lex fori is merely a last resort applying to those increasingly diminishing number of parties who, for one reason or another, fail to take advantage of the doctrine of party autonomy.

Some conclusions

1. A Practical Solution

To apply the lex fori is the only practical solution. All the alternatives that have been tried contain more difficulties and achieve less goals than otherwise. From a New Zealand viewpoint it is very likely that any action started in our courts will involve a contract containing some New Zealand aspects and for those who prefer to con-

⁸⁴J.A. Martin. An Approach to the Choice of Law Problem. 35 Mercer L.R. 583 at p.594 (1983-1984).

sider the choice of law issue in traditional terms, it is very likely that the court would have found the proper law of the contract to be that of New Zealand using the third rule of the proper law anyway. If the result is likely to be the same then how much better it is to state openly that the *lex fori* is being applied as a last resort rather than have to rely on a method which requires much time and effort, tortuous reasoning and other difficulties.

Another point that may be made here is that the proposed rule does not require any insurmountable changes. It would be interesting to formulate a body of substantive rules to apply internationally to all international contracts, or even to formulate new concepts to assist the choice of law process. This is not however feasible. If such a body of international substantive law was to be formulated it would require the co-operation of many countries and obviously the appropriate instigator and organiser would have to be one of the major world trading communities, not a small geographically isolated country such as New Zealand.

It is pointless to be over ambitious. What is required for New Zealand parties, lawyers and judges is a clear, easily found, readily applied rule or rules for international contracts. Overseas parties, lawyers and judges should be able to find out what our rules are

without the "help of heaven"⁸⁵ as at present required.

Compromises do exist. There is for example no suggestion that the present jurisdiction-selection approach should be abandoned despite the obvious disadvantage of "blind justice."⁸⁶ It would again be unrealistic to expect our legal system to make radical changes which would be necessitated by adopting a system which was result-orientated.

2. Results Certain and Satisfactory

Not only is the application of the lex fori in the absence of choice the only practical and reasonable solution; it makes for certainty and achieves directly the same result that judges obtained previously by a laborious route.

When one considers the cases discussed under the third rule of the proper law, the second sentence of the Uniform Commercial Code of New York and the New York common law cases where no choice of law clauses exist a certain pattern emerges.

On both sides of the Atlantic the overwhelming majority of cases apply the lex fori at the end of the day anyway.

⁸⁵Webb suggests that such assistance is required when overseas lawyers contemplate the conflict of laws provisions of our contract statutes. See P.R.H. Webb. Heaven Help the Overseas Conflict Lawyers. (1979) N.Z.L.J. 442.

⁸⁶"Without taking the content of the conflicting laws into account, how could one know what would satisfy the demands of justice of the requirements of policy?" D. Cavers. The Choice-of-law Process (1965) at p.9.

Of the decisions⁸⁷ considered in the context of New York common law only one would produce a different result if the lex fori had been applied and as that was not a commercial contract it may be discounted.⁸⁸ The other decisions applied the law of New York for one reason or another.

The trilogy of cases considered in the setting of the Uniform Commercial Code⁸⁹ likewise reveal a similar pattern. Again only one of the decisions⁹⁰ failed to apply New York law although New York law could equally have been applied if the New York contacts had been emphasised.⁹¹ There would thus be nothing amiss if New York law had been applied as the lex fori.

Turning to the English decisions the arbitration cases⁹² all applied English law and thus the same result obtains, and as was pointed out above two important decisions applied

⁸⁷See supra at p.270.

⁸⁸Auten v. Auten. 124 N.E. 2d. 99 (1954).

⁸⁹Bache & Co. Inc. v. International Controls Corp. 339 F. Supp. 341 (1972).
Hughes v. Marine Midland Bank N.A. 484 N.Y.S. 2d. 1000 (City Ct. 1985).
Windsor Industries Inc. v. Eaca International Ltd. 548 F. Supp. 635 (1982).

⁹⁰Windsor Industries Inc. v. Eaca International Ltd. 548 F. Supp. 635 (1982).

⁹¹The plaintiff was a New York Corporation; delivery was made in New York and the games were to be sold and distributed there.

⁹²See supra at p.49.

English law as the proper law⁹³ and in a third⁹⁴ the litigants ended up by applying an English statute anyway.

There are of course examples of English cases where English law was not applied but these are the rarer cases. They need considering at this stage. If the lex fori is to apply (if no choice of law clause exists) it is important that it can be demonstrated that the lex fori would not work unsatisfactorily to cases decided in the past that did not apply the law of the forum.

The facts of Rossano v. Manufacturers Life Insurance Co.⁹⁵ were given above when the case was used to demonstrate the applications of the third rule of the proper law. Two arguments may be put forward to support application of the lex fori. First it could be argued that no injustice is done to Mr. Rossano if English law is applied. English law had no embargo on paying Rossano any more than Ontario law had.⁹⁶ If either Ontario or English law was applied

⁹³James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd. [1970] A.C. 583 and Amin Rasheed v. Kuwait Insurance Co. 1984 A.C. 50.

⁹⁴The Assunzione [1954] P.150.

⁹⁵[1963] 2 Q.B. 352.

⁹⁶Supervening Egyptian legislation made payment on the insurance policies to Rossano without the consent of the Egyptian Exchange Control Authorities illegal. The question was whether the insurance company could insist on payment in Egypt or whether Rossano could require payment outside Egypt.

Rossano could be paid out in a country that was not Egypt.

Secondly, having satisfied Rossano and worked no injustice to the insurance company⁹⁷ it can be argued that the lex fori makes for certainty in a case such as Rossano's. Until the case was litigated there was no certainty which law was the proper law. Contacts existed with Egypt, Toronto, England and New York. Applying the law that had the closest and most real connection could equally have resulted in English law being applied,⁹⁸ or that of New York.⁹⁹ One could argue that the contract was not particularly connected to any of the four jurisdictions. If it were known in advance that the lex fori was to apply a court case could probably have been avoided.

If Mr. Rossano would be contented with English law applying to his contract Mr. Bonython would be equally pleased to find that the lex fori applied and that English law determined the meaning of the word 'pound'.¹⁰⁰

⁹⁷Which presumably had not acted on the expectation that Egyptian legislation would be passed.

⁹⁸Two of the policies were for a sum in sterling with the money payable in bankers' demand drafts on London for sterling.

⁹⁹The third policy was for a sum in United States dollars to be paid in a bankers' demand draft in New York.

¹⁰⁰As Inglis notes the contention that the stock holders be paid either one thousand pounds sterling or one thousand pounds Australian was not without "some moral merit." See B.D. Inglis. Conflict of Laws. (1959). The case referred to is Bonython V. Commonwealth of Australia [1951] A.C. 201.

Other cases¹ which applied a law other than English law could equally have applied English law on the grounds that it was the law most closely connected to the contract. In Coupland v. Arabian Gulf Petroleum Co.² the English contacts arguably outweigh the Libyan contacts³ and in Sayers v. International Drilling⁴ the same could be said.⁵

The only important case discussed in Part A that did not have as many English contacts as non forum contacts is the United Railways of Havana decision⁶ and even here "the view might have been taken that English law should be the proper law because the head office of the railway company was situated in England."⁷ If this is so then again from a practical point of view the lex fori might just as well have applied as the law of Pennsylvania.

¹E.g. Coupland v. Arabian Gulf Petroleum Co. [1983] 2 All E.R. 434. E.g. Sayers v. International Drilling Co. N.V. [1971] 3 All E.R. 163.

²Ibid.

³Summarised by Webb at p.35.

⁴[1971] 3 All E.R. 163.

⁵Lord Denning held that if he had to decide the proper law of the contract (apart from the tort) he would "be inclined" to say that it was English. Ibid at p.166.

⁶Tomkinson v. First Pennsylvania Banking & Trust Co. [1961] A.C. 1007.

⁷Webb at p.36.

The conclusion is that courts tend to apply their own law when no choice of law clause exists. The tendency is understandable, it is easy to apply one's own law; often it may be considered inherently preferable to some foreign law, and it can be seen as eminently reasonable for litigants to choose the forum and its laws rather than some other foreign law.

Secondly in the cases considered in Parts A and B above no obvious disadvantages emerge from applying forum law. What is unsatisfactory is the present practice of applying the lex fori under the guise of the third rule of the proper law or the centre of gravity approach.

Given this second conclusion it appears that no exception need be applied to the proposed rule that the lex fori determine the construction and validity of an international contract where the parties have failed to make a choice of law decision.

3. No Need for any Exceptions to the Application of the Lex Fori

It would appear from the foregoing discussion that no exceptions are required by way of an escape device to application of the lex fori in the absence of party choice. The court will only be doing openly what it did before via a different rule. The cases show that the courts do in effect apply the lex fori absent a choice of law clause. In none of the cases considered would it be unsatisfactory

to apply the lex fori openly as the applicable law in cases which do not contain a choice of law clause.

Conclusion

It is recommended that the proposed Conflict of Laws (Contracts) Act contain a provision that reads:

In the absence of a choice of law by the parties a New Zealand court shall apply the domestic law of New Zealand to any issue arising from the contract.⁸

Conclusion to Part E

"...I cursed the clients. I had told them a dozen times that if they wanted to save confusion and expense they should say specifically in any contract they made with foreigners that English law governed. After a good deal of searching and puffing and blowing, I came to the conclusion that English law governed which was a relief because it meant that there was some chance of me knowing what I was talking about."⁹

It is recommended that New Zealand adopt a legislative solution to the choice of law issue for international contracts and that an Act entitled The Conflict of Laws (Contracts) Act be passed. The main provisions of such an enactment would be as follows:

⁸This will make it clear that the lex fori will govern all aspects of construction and validity of the contract.

⁹From "Lawyer Heal Thyself" by B. Mortlock. (The Autobiography of a Solicitor) (1959) at p.169.cited by Webb & Brown at p.301.

1. An international contract is a contract that has significant elements connected to more than one jurisdiction.
2. Parties to an international contract may agree upon a law to govern their contract or any part thereof. A New Zealand court shall apply the law thus chosen by the parties unless:
 - (a) to do so would result in application of a law which is repugnant to public policy in New Zealand, or
 - (b) An enactment expressly provides or its object clearly requires application of a different law. or
 - (c) The choice of law clause was obtained by fraud, undue influence, overwhelming bargaining power or duress.

A New Zealand court shall apply the domestic law of New Zealand to any contract to which sub-sections (a) (b) or (c) above apply.
3. In the absence of a choice of law by the parties a New Zealand court shall apply the domestic law of New Zealand to any issue arising from the contract.
4. A choice of the laws of a jurisdiction shall be read as a reference to its internal or domestic laws excluding its conflict of laws rules.
5. A New Zealand court shall always apply the law of New Zealand to matters of procedure and evidence.

In the last few decades there has been a dramatic rise in the volume, range and complexity of international

business both in this country and overseas. This trend will probably continue. New commercial and financial techniques have arisen and many more countries participate on a regular basis on the world market than was the case fifty years ago. Disputes can arise in countries having radically different legal systems and conflicting ideas about the function and interpretation of their agreements.

It is no longer appropriate to consider that international contracts have a 'proper' law as such, indeed many contracts can be seen as truly international with no particular links with any domestic systems of law. Yet in New Zealand judges and lawyers, litigants and businessmen have to rely on rules that were developed in less commercially sophisticated times. The law is often difficult to find and difficult to apply.

The time has come for New Zealand to adopt a legislative solution. The law will thus be easy to find. The rules proposed are easy to state and easy to apply; they will be of service to all.

Party autonomy with its limited exceptions suits today's international business operations. At the other end of the spectrum the *lex fori* will work well in situations where the litigants are not sophisticated businessmen but ordinary persons who have, possibly unknowingly, entered a contract that is international in character.

All participants in international transactions would benefit by the proposed legislation and New Zealand would

be unique in common law countries in having a satisfactory law to determine one aspect of a subject that has long been termed a 'quaking quagmire'.¹⁰

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¹⁰The term is Prosser's from selected Topics on the Law of Torts (1953) at p.89.

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ACKNOWLEDGEMENTS

I would like to thank Professor J.H. Burrows of the University of Canterbury for the considerable assistance he has given me in the preparation and completion of this thesis. His suggestions for improvements and corrections have proved invaluable. Whatever errors remain, are of course my own.

I am grateful to Doctor P. Spiller and Mr. D. Rowe both of the University of Canterbury for kindly reading a hand written copy of my thesis.

Finally I should like to thank both Gail Pattie the Law Librarian at the University of Canterbury for her continual assistance in obtaining materials and Eleanor Horne for typing the thesis with speed and accuracy.

APPENDICES

APPENDIX A

CONVENTION
ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS

opened for signature in Rome on 19 June 1980
(80/934/EEC)

PREAMBLE

The High Contracting Parties to the Treaty establishing the European Economic Community,

Anxious to continue in the field of private international law the work of unification of law which has already been done within the Community, in particular in the field of jurisdiction and enforcement of judgments,

Wishing to establish uniform rules concerning the law applicable to contractual obligations,

HAVE AGREED AS FOLLOWS:

TITLE 1

SCOPE OF THE CONVENTION

Article 1

Scope of the Convention

1. The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.
2. They shall not apply to
 - (a) questions involving the status or legal capacity of natural persons, without prejudice to Article 11;
 - (b) contractual obligations relating to:
 - wills and succession,
 - rights in property arising out of a matrimonial relationship,
 - rights and duties arising out of a family relationship, parentage, marriage, or affinity, including maintenance obligations in respect of children who are not legitimate;
 - (c) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable

instruments arise out of their negotiable character;

- (d) arbitration agreements and agreements on the choice of court;
 - (e) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organization or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body;
 - (f) the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or incorporate, to a third party;
 - (g) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;
 - (h) evidence and procedure, without prejudice to Article 14.
3. The rules of this Convention do not apply to contracts of insurance which cover risks situated in the territories of the Member States of the European Economic Community. In order to determine whether a risk is situated in these territories the court shall apply its internal law.
 4. The preceding paragraph does not apply to contracts of re-insurance.

Article 2

Application of law of non-contracting States

Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State.

TITLE II UNIFORM RULES

Article 3

Freedom of Choice

1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.
2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the con-

tract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.

3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called 'mandatory rules'.
4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.

Article 4

Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.
2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.
3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.
4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumption in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

Article 5

Certain consumer contracts

1. This article applies to a contract the object of which is the supply of goods or services to a person ('the consumer') for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.
2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:
 - if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
 - if the other party or his agent received the consumer's order in that country, or
 - if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the customer to buy.
3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.
4. This Article shall not apply to:
 - (a) a contract of carriage;
 - (b) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.
5. Notwithstanding the provisions of paragraph 4, this Article shall apply to a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Article 6

Individual employment contracts

1. Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.
2. Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:
 - (a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or
 - (b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated;

unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

Article 7

Mandatory Rules

1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.
2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

Article 8

Material validity

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid.
2. Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.

Article 9
Formal Validity

1. A contract concluded between persons who are in the same country is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of the country where it is concluded.
2. A contract concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of one of those countries.
3. Where a contract is concluded by an agent, the country in which the agent acts is the relevant country for the purposes of paragraphs 1 and 2.
4. An act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which under this Convention governs or would govern the contract or of the law of the country where the act was done.
5. The provisions of the preceding paragraphs shall not apply to a contract to which Article 5 applies, concluded in the circumstances described in paragraph 2 of Article 5. The formal validity of such a contract is governed by the law of the country in which the consumer has his habitual residence.
6. Notwithstanding paragraphs 1 to 4 of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract.

Article 10
Scope of the applicable law

1. The law applicable to a contract by virtue of Articles 3 to 6 and 12 of this Convention shall govern in particular:
 - (a) interpretation;
 - (b) performance;
 - (c) within the limits of the powers conferred on the court by its procedural law, the consequence of breach, including the assessment of damages in so far as it is governed by rules of law;
 - (d) the various ways of extinguishing obligation, and prescription and limitation of actions;

- (e) the consequences of nullity of the contract.
- 2. In relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place.

Article 11

Incapacity

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

Article 12

Voluntary assignment

- 1. The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ('the debtor') shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.
- 2. The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

Article 13

Subrogation

- 1. Where a person ('the creditor') has a contractual claim upon another ('the debtor'), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship and, if so, whether he may do so in full or only to a limited extent.
- 2. The same rule applies where several persons are subject to the same contractual claim and one of them has satisfied the creditor.

Article 14

Burden of proof, etc.

1. The law governing the contract under this Convention applies to the extent that it contains, in the law of contract, rules which raise presumptions of law or determine the burden of proof.
2. A contract or an act intended to have legal effect may be proved by any mode of proof recognized by the law of the forum or by any of the laws referred to in Article 9 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

Article 15

Exclusion of renvoi

The application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law.

Article 16

'Ordre public'

The applications of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ('ordre public') of the forum.

Article 17

No retrospective effect

The Convention shall apply in a Contracting State to contracts made after the date on which this Convention has entered into force with respect to that State.

Article 18

Uniform interpretation

In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application.

Article 19

States with more than one legal system

1. Where a State comprises several territorial units each of which has its own rules of law in respect of contractual obligations

each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Convention.

2. A State within which different territorial units have their own rules of law in respect of contractual obligations shall not be bound to apply this Convention to conflicts solely between the laws of such units.

Article 20

Precedence of Community law

The Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts.

Article 21

Relationship with other conventions

This Convention shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party.

Article 22

Reservations

1. Any Contracting State may, at the time of signature, ratification, acceptance of approval, reserve the right not to apply:
 - (a) the provisions of Article 7(1);
 - (b) the provisions of Article 10(1)(e).
2. Any Contracting State may also, when notifying an extension of the Convention in accordance with Article 27(2), make one or more of these reservations, with its effect limited in all or some of the territories mentioned in the extension.
3. Any Contracting State may at any time withdraw a reservation which it has made; the reservation shall cease to have effect on the first day of the third calendar month after notification of the withdrawal.

TITLE III
FINAL PROVISIONS

Article 23

1. If, after the date on which the Convention has entered into force for a Contracting State, that State wishes to adopt any new choice of law rule in regard to any particular category of contract within the scope of this Convention, it shall communicate its intention to the other signatory States through the Secretary-General of the Council of the European Communities.
2. Any signatory State may, within six months from the date of the communication made to the Secretary-General, request him to arrange consultations between signatory States in order to reach agreement.
3. If no signatory State has requested consultations within this period or if within two years following the communication made to the Secretary-General no agreement is reached in the course of consultations, the Contracting State concerned may amend its law in the manner indicated. The measures taken by that State shall be brought to the knowledge of the other signatory States through the Secretary-General of the Council of the European Communities.

Article 24

1. If, after the date on which this Convention has entered into force with respect to a Contracting State, that State wishes to become a party to a multilateral convention whose principal aim or one of whose principal aims is to lay down rules of private international law concerning any of the matters governed by this Convention, the procedure set out in Article 23 shall apply. However, the period of two years, referred to in paragraph 3 of that Article, shall be reduced to one year.
2. The procedure referred to in the preceding paragraph need not be followed if a Contracting State or one of the European Communities is already a party to the multilateral convention, or if its object is to revise a convention to which the State concerned is already a party, or if it is a convention concluded within the framework of the Treaties establishing the European communities.

Article 25

If a contracting State considers that the unification achieved by this Convention is prejudiced by the conclusion of agreements not covered by Article 24(1) that State may request the Secretary-General of the Council of the European Communities to arrange consultations between the signatory States of this Convention.

Article 26

Any Contracting State may request the revision of this Convention. In this event a revision conference shall be convened by the President of the Council of the European Communities.

Article 27

1. This Convention shall apply to the European territories of the Contracting States, including Greenland, and to the entire territory of the French Republic.
2. notwithstanding paragraph 1:
 - (a) this Convention shall not apply to the Faroe Islands, unless the kingdom of Denmark makes a declaration to the contrary;
 - (b) this Convention shall not apply to any European territory situated outside the United Kingdom for the international relations of which the United Kingdom is responsible, unless the United Kingdom makes a declaration to the contrary in respect of any such territory;
 - (c) this Convention shall apply to the Netherlands Antilles, if the Kingdom of the Netherlands makes a declaration to that effect.
3. Such declarations may be made at any time by notifying the Secretary-General of the Council of the European Communities.
4. Proceedings brought in the United Kingdom on appeal from courts in one of the territories referred to in paragraph 2(b) shall be deemed to be proceedings taking place in those courts.

Article 28

1. This Convention shall be open from 19 June 1980 for signature by the States party to the Treaty establishing the European Economic Community.
2. This Convention shall be subject to ratification, acceptance or approval by the signatory States. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the Council of the European Communities.

Article 29

1. This Convention shall enter into force on the first day of the third month following the deposit of the seventh instrument of ratification, acceptance or approval.
2. This Convention shall enter into force for each signatory State ratifying, accepting or approving at a later date on the first day of the third month following the deposit of its instrument

of ratification, acceptance or approval.

Article 30

1. This Convention shall remain in force for 10 years from the date of its entry into force in accordance with Article 29(1) even for States for which it enters into force at a later date.
2. If there has been no denunciation it shall be renewed tacitly every five years.
3. A Contracting State which wishes to denounce shall, not less than six months before the expiration of the period of 10 or five years, as the case may be, give notice to the Secretary-General of the Council of the European Communities. Denunciation may be limited to any territory to which the Convention has been extended by a declaration under Article 27(2).
4. The denunciation shall have effect only in relation to the State which has notified it. The Convention will remain in force as between all other Contracting States.

Article 31

The Secretary-General of the Council of the European Communities shall notify the States party to the Treaty establishing the European Economic Community of:

- (a) the signatures;
- (b) the deposit of each instrument of ratification, acceptance or approval;
- (c) the date of entry into force of this Convention;
- (d) communications made in pursuance of Articles 23, 24, 25, 26, 27, and 30;
- (e) the reservations and withdrawals of reservations referred to in Article 22.

Article 32

The Protocol annexed to this Convention shall form an integral part thereof.

Article 33

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Irish and Italian languages, these texts being equally authentic, shall be deposited in the archives of the

Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy thereof to the Government of each signatory State.

APPENDIX B

THE RESTATEMENT (SECOND) CONFLICT OF LAWS (1971)S.186. Applicable Law

Issues in contract are determined by the law chosen by the parties in accordance with the rule of S.187 and otherwise by the law selected in accordance with the rule of S.188.

S.187 Law of the State Chosen by the Parties

- (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
- (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
 - (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
 - (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of S.188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
- (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

S.188 Law Governing in Absence of Effective Choice by the Parties

- (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in S.6.

- (2) In the absence of an effective choice of law by the parties (see S.187) the contacts to be taken into account in applying the principles of S.6 to determine the law applicable to an issue include:
- (a) The place of contracting.
 - (b) The place of negotiation of the contract
 - (c) The place of performance
 - (d) The location of the subject matter of the contract, and
 - (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

- (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied except as otherwise provided in S.189-199 and 203.

APPENDIX C

New York Uniform Commercial Code S.1-105(McKinney Supp. 1981-1982)Section 1-105 Territorial Application of the Act; Parties'
Power to Choose Applicable Law.

- (1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.
- (2) Where one of the following provisions of this Act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. Section 2-402.

Applicability of the Article on Bank Deposits and Collections.
Section 4-102.

Bulk transfers subject to the Article on Bulk Transfers.
Section 6-102.

Applicability of the Article on Investment Securities. Section
8-106.

Perfection provisions of the Article on Secured Transactions.
Section 9-103.

OFFICIAL COMMENTPurposes:

1. Subsection (1) states affirmatively the right of the parties to a multi-state transaction or a transaction involving foreign trade to choose their own law. That right is subject to the firm rules stated in the six sections listed in subsection (2) and is limited to jurisdictions to which the transaction bears a "reasonable relation." In general, the test of "reasonable relation" is similar to that laid down by the Supreme Court in *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 47 S.Ct. 626, 71 L. Ed. 1123 (1927). Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs. But an agreement as to choice of law may sometimes take effect as a shorthand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen.

2. Where there is no agreement as to the governing law, the Act is applicable to any transaction having an "appropriate" relation to any state which enacts it. Of course the Act applies to any transaction which takes place in its entirety in a state which has enacted the Act. But the mere fact that suit is brought in a state does not make it appropriate to apply the substantive law of that state. Cases where a relation to the enacting state is not "appropriate" include, for example, those where the parties have clearly contracted on the basis of some other law, as where the law of the place of contracting and the law of the place of contemplated performance are the same and are contrary to the law under the Code.
3. Where a transaction has significant contacts with a state which has enacted the Act and also with other jurisdictions, the question what relation is 'appropriate' is left to judicial decision. In deciding that question, the court is not strictly bound by precedents established in other contexts. Thus a conflict-of-laws decision refusing to apply a purely local statute or rule of law to a particular multistate transaction may not be valid precedent for refusal to apply the Code in an analogous situation. Application of the Code in such circumstances may be justified by its comprehensiveness, by the policy of uniformity, and by the fact that it is in large part a reformation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries. Compare *Global Commerce Corp. v. Clark-Babbitt Industries, Inc.*, 239 F.2d 716, 719 (2d Cir.1956). In particular, where a transaction is governed in large part by the Code, application of another law to some detail of performance because of an accident of geography may violate the commercial understanding of the parties.
4. The Act does not attempt to prescribe choice-of-law rules for states which do not enact it, but this section does not prevent application of the Act in a court of such a state. Common-law choice of law often rests on policies of giving effect to agreements and of uniformity of result regardless of where suit is brought. To the extent that such policies prevail, the relevant considerations are similar in such a court to those outlined above.
5. Subsection (2) spells out essential limitations on the parties' right to choose the applicable law. Especially in Article 9 parties taking a security interest or asked to extend credit which may be subject to a security interest must have sure ways to find out whether and where to file and where to look for possible existing filings.